

1 STEVEN G. KALAR
2 Federal Public Defender
3 GALIA AMRAM
4 Assistant Federal Public Defender
5 STEVEN J. KOENINGER
6 Research and Writing Attorney
7 DANIEL BLANK
8 Assistant Federal Public Defender
9 CANDIS MITCHELL
10 Assistant Federal Public Defender
11 ELLEN LEONIDA
12 Assistant Federal Public Defender
13 450 Golden Gate Ave, 19-6884
14 San Francisco, CA 94102
15 Telephone: (415) 436-7700
16
17 Attorneys for Defendants

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28 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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14 UNITED STATES OF AMERICA,
15 Plaintiff,
16 v.
17 DAVID MADLOCK,
18 MATTHEW MUMPHREY,
19 LATONYA CAREY,
20 CRYSTAL ANTHONY,
21 DARLENE ROUSE,
22 ACACIA MCNEAL,
23 ANITA DIXON,
24 AARON MATTHEWS,
NIJAH REED,
TIANA REDDIC,
TIFFANY CROSS,
SHOLANDA ADAMS,
Defendants.

Case No: CR 14-643 EMC

**NOTICE OF MOTION AND MOTION
TO COMPEL DISCOVERY ON
SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION**

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
CASE NO. CR 14-643 EMC

NOTICE OF MOTION

TO BRIAN STRETCH, ACTING UNITED STATES ATTORNEY FOR THE
NORTHERN DISTRICT OF CALIFORNIA, AND TO SARAH HAWKINS AND
LLOYD FARNHAM, ASSISTANT UNITED STATES ATTORNEYS:

NOTICE IS HEREBY GIVEN that on February 9, 2016 at 10:00 a.m., or as soon as this motion may be heard, the above-captioned defendants will move the Court for an order to compel discovery on selective prosecution and selective enforcement.

This motion is based upon the Memorandum of Points and Authorities in Support hereof, the attached exhibits and declarations, the Fifth and Fourteenth Amendments of the United States Constitution, applicable case law, records and files in the instant action, and such other matters as may be adduced at the hearing of this cause.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On December 5, 2014, San Francisco Police Department (“SFPD”) officers were conducting a “buy bust” operation focused on the intersection of Hyde Street and Golden Gate Avenue. This area of the Tenderloin not only was “well known to officers due to the high level of narcotics activity” that takes place there, but SFPD and the Tenderloin community also knew it was controlled by Latino narcotics traffickers. The intersection of Hyde and Golden Gate is located approximately a block and a half from the DeMarillac Academy, a school for young children. According to one officer participating in the December 5 “buy bust,” “[p]arents who have no other option, but to walk their children to and from this school must endure walking through what seems like a narcotics flea market on a daily basis.”¹

During the December 5 operation, one undercover officer “observed a Hispanic male,” (John Doe-1), who was standing on the corner and had previously been identified by citizen informants “as one of the people who is out on a daily basis selling suspected base rock cocaine during morning hours.”² The officer approached Doe-1 and purchased a rock of crack cocaine from him; Doe-1 was then arrested by other SFPD officers. This was not Doe-1’s first arrest for selling crack at the corner of Golden Gate and Hyde. Rather, Doe-1 was arrested at that same location for the same crime less than three months before, on September 10, 2014.³ At the time of his September 10 arrest, Doe-1 also had an outstanding warrant based on yet another drug-trafficking violation under California Health & Safety Code section 11352, which prohibits the

¹ Ex. 1, Declaration of Steven J. Koeninger in Support of Motion to Compel Discovery on Selective Prosecution and Enforcement (“Koeninger Disco. Mtn. Decl.”), Att. A at Ex.00420.

2 Id.

³ Id. at Ex 00486-90

1 transportation and sale of a controlled substance.⁴

2 Later that same day, an officer involved in Doe-1's arrest returned to the area of Hyde
 3 and Golden Gate and "used a roll-a-tape" to confirm that the distance between where Doe-1's
 4 narcotics transaction took place and the front Gate of the DeMarillac Academy was less than
 5 1,000 feet.⁵ While the officer was in the process of measuring the distance between DeMarillac
 6 Academy and Doe-1's drug transaction, he encountered yet *another* crack cocaine transaction "in
 7 progress" between "a Latin male" and two other men in front of 288 Golden Gate Avenue – a
 8 location even closer to DeMarillac Academy than 101 Hyde Street.⁶ The officer arrested the
 9 "Latin male," (John Doe-2) and found "twelve individually wrapped pieces" of crack cocaine
 10 and two knives on his person. As SFPD transported Doe-2 to Tenderloin Station for booking, he
 11 told officers that he was a "Sureno from the south side."⁷

12 While booking Doe-2, SFPD also determined that he had an even more extensive history
 13 of drug-trafficking in the Tenderloin than Doe-1. A records check revealed that Doe-2 was
 14 currently on felony probation for a prior conviction under H&S Code section 11352(a) and also
 15 had an outstanding, no-bail warrant related to that conviction. The incident underlying the
 16 conviction occurred in June 2010 "at 370 Turk Street."⁸ The SFPD records check also revealed
 17 that Doe-2 had an open case pending in Superior Court based on a May 2014 violation of section
 18 11352(a) and a no-bail warrant related to that case, too. The arrest underlying that incident

19

20 ⁴ See *id.* at Ex.00489; Cal. H&S Code § 11352. The text of this motion makes numerous
 21 references to the California Health & Safety Code, which herein is abbreviated as "H&S Code."

22 ⁵ See *id.* at Ex.00421; *id.* at Ex.00426 (incident report stating that on December 5, 2014, "I was
 23 conducting an investigation pertaining to Case# 141024755 [Doe-1's incident number] which
 24 involved measuring the distance between 175 Golden Gate Avenue [DeMarillac Academy] and
 25 101 Hyde Street with a roll-a-tape measurement device").

26 ⁶ See Ex. 1, Koeninger Disco. Mtn. Decl. at Ex.00426.

27 ⁷ *Id.*

28 ⁸ *Id.* at Ex.00427. *see also* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02209.1 (listing
 29 prior cases filed against Doe-2 in San Francisco Superior Court, including arrest date and
 30 location).

1 occurred “at 101 Hyde Street.” Finally, the records check also revealed that Doe-2 had a March
 2 2009 conviction – again for violating section 11352(a), and again based on an incident that
 3 happened in the Tenderloin.⁹

4 Although Doe-1 and Doe-2 *both* were arrested while trafficking crack cocaine within
 5 1,000 feet of the DeMarillac Academy, and although *both* had been repeatedly arrested by SFPD
 6 for drug-trafficking in the Tenderloin, *neither* of these Hispanic/Latino individuals were
 7 prosecuted in federal court under Operation Safe Schools – a program, jointly undertaken by the
 8 United States Attorney’s Office (“USAO”), the Drug Enforcement Administration (“DEA”), and
 9 the SFPD.¹⁰ Pursuant to Operation Safe Schools, SFPD/DEA taskforce officers arrested
 10 Tenderloin-based drug traffickers for prosecution in federal court under a statute prohibiting
 11 drug-trafficking within 1,000 feet of educational institutions and playgrounds – a statute that also
 12 provides for mandatory-minimum sentences. Unlike Doe-1 and Doe-2 – and hundreds of other
 13 similarly situated individuals¹¹ – all thirty-seven people prosecuted under Operation Safe Schools
 14 were **Black**. Moreover, eight of the thirty-seven Operation Safe Schools defendants were
 15 charged federally based on incidents that occurred within a mere five days of December 5,
 16 2014¹² – that is, the day of Doe-1 and Doe-2’s arrests described above.

17 Race, and not some other factor, explains the failure to include any of the non-Black drug
 18

19 ⁹ Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00427; *see also* Ex. 1, Koeninger Disco. Mtn.
 20 Decl., Att. F at Ex.02209.1.

21 ¹⁰ Instead, both were charged in San Francisco Superior Court. *Id.* at Ex.02202, 02209.1; *see*
 22 *also* Ex. 2, Declaration of Rob Ultan in Support of Motion to Compel Discovery on Selective
 23 Prosecution and Enforcement (“Ultan Disco. Mtn. Decl.”), Att. B at Ex.02519-21 (felony
 24 complaint for Doe-2).

25 ¹¹ More than 40 similarly-situated individuals (non-Black drug traffickers in the Tenderloin) are
 26 described in detail in this brief. *See* Section V *infra*. Hundreds more Tenderloin-based drug-
 27 trafficking arrests, involving non-Black individuals, are listed in Attachments to the Koeninger
 28 Declaration. *See* Ex. 1, Koeninger Disco. Mtn. Decl., Atts. B, G.

29 ¹² *See* Ex. 3, Declaration of Sheree Cruz-Laucirica in Support of Motion to Compel Discovery on
 30 Selective Prosecution and Enforcement (“Cruz Disco. Mtn. Decl.”), Att. A at Ex.02851-52.

1 traffickers in Operation Safe Schools. This fact is borne out by a varied and compelling array of
 2 evidence including:

- 3 • The statistical disparity between the racial demographics of Tenderloin drug
 traffickers charged in state court (61.4% Black) and those charged federally in
 Operation Safe Schools (100% Black) is so large that a sociologist concludes:
 “there is virtually no chance that this difference is the result of chance.”¹³
- 4
- 5 • Police reports in which Tenderloin SFPD officers admit that: “I have participated
 in hundreds of buy busts and surveillances in this area. I know that many of the
 drug dealers in the Hyde Street area are of Honduran descent. I have seen the
 described behavior hundreds of times.”¹⁴
- 6
- 7 • Declarations from community members, including a former AUSA and current
 law professor, a security guard for the federal courthouse, and managers from
 GLIDE and the Tenderloin Housing Clinic, attesting to the diversity of the drug
 selling population and law enforcement awareness of it.
- 8
- 9 • Hundreds of police reports in which SFPD officers arrest non-Black Tenderloin
 drug traffickers.
- 10
- 11 • Over 30 declarations describing a pattern of racial animus by Tenderloin police
 officers including the use of racial slurs (“nigger,” “black bitch,” “boy”), sexual
 misconduct against Black women, acts of violence against Black men and
 women, and a disparate focus on Black drug dealers.
- 12
- 13 • Use of racially inappropriate language and conduct in videos of Operation Safe
 Schools’ investigations.
- 14
- 15 • The fact that not all the Black defendants charged federally in Operation Safe
 Schools met the charging criteria set forth by the AUSAs, while similarly-situated
 non-Black persons do meet the charging criteria.
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21 The evidence of racial animus by Tenderloin police officers that is detailed in this motion
 22 is provided against a backdrop of longstanding concern with racial bias in the SFPD. Moreover,

23
 24 ¹³ Declaration of Galia Amram Phillips In Support Of Motion to Compel Discovery on Selective
 Prosecution and Enforcement (“Amram Disco. Mtn. Decl.”), Att. M at Ex.04220.

25 ¹⁴ Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00773. *See also id.* at Ex.00736 (officer
 reporting in April 2015 that “[b]ased off prior arrests and contacts, I know that the corner of
 Eddy Street and Hyde Street is primarily controlled by Honduran national drug dealers”).

1 the strength of the evidence of racial bias amongst the law enforcement officers in Operation
 2 Safe Schools, and the public nature of it, raises concerns with the U.S. Attorney's Office as well.
 3 The race-neutral reasons provided by the AUSAs for their charging decisions (outlined in their
 4 July 2015 Declarations) do not hold up – both because not all the Operation Safe School
 5 defendants met the charging criteria, and also because a comparative analysis of the 37
 6 Operation Safe Schools defendants with the similarly-situated persons shows that the race-
 7 neutral reasons are pre-textual. It also appears from the AUSAs declarations and other
 8 information described below, that at the time these prosecutions were authorized, the USAO
 9 knew, or should have known, about the racial diversity of drug sellers in the Tenderloin and, at
 10 least by the 2014 sweep, knew, or should have known, that there were serious problems with
 11 racism in SFPD, and that the only people charged so far in Operation Safe Schools were Black.

12 This begs the question of what the USAO did to insure that the people law enforcement
 13 presented for prosecution in Operation Safe Schools actually met the charging criteria (since not
 14 all of them did), and what the USAO did to make sure that non-Black individuals not presented
 15 for prosecution did not meet the charging criteria (as many, many non-Black individuals did).
 16 None of the AUSAs Declarations state that there was any policy in place for this, and it remains
 17 unclear if the decision about whom to target was left to law enforcement – law enforcement
 18 officers whom the government had reason to suspect were racially biased.

19

20 **FACTUAL BACKGROUND**21 **I. Operation Safe Schools**22 A. Overview

23 Operation Safe Schools is a partnership between the United States Attorney's Office, the
 24 SFPD and the DEA. Declaration of Galia Phillips In Support Of Notice Of Related Case
 25 ("Phillips Related Case Decl."), Att. C [2.12.15 USAO Press Release], *United States v. Chrystal*
 26 *Anthony*, No. 15cr005 (N.D. Cal. filed 03/31/15) [Docket No. 11]. The stated goal of Operation
 27

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1 Safe Schools is to “use the law enforcement tools available to [the government] to make
 2 neighborhoods like the Tenderloin safe, and to ensure that children who live and go to school in
 3 these neighborhoods are not exposed to crime and drug dealing.” *Id.* Thus far, Operation Safe
 4 Schools consists of two sweeps of the Tenderloin neighborhood in San Francisco, CA. The first
 5 sweep was between approximately August and November 2013, and the second sweep was
 6 between approximately October and December 2014. Ex. 3, Cruz Disco. Mtn. Decl., Att. A at
 7 Ex.02851-52.

8 The people arrested pursuant to Operation Safe Schools were charged in the San
 9 Francisco division of the United States District Court for the Northern District of California.
 10 Each defendant was charged with selling drugs within 1,000 feet of a school, playground, or
 11 college in violation of 21 U.S.C. §§ 841 and 860.¹⁵ They face a one-year mandatory-minimum
 12 sentence under § 860 and a six-year mandatory minimum term of supervised release.¹⁶ The
 13 DEA/SFPD taskforce arrested fourteen people pursuant to Operation Safe Schools in the 2013
 14 sweep, and twenty-three people in the 2014 sweep. Ex. 3, Cruz Disco. Mtn. Decl., Att. A at
 15 Ex.02851-52. All thirty-seven people arrested by the DEA/SFPD and charged federally under
 16 Operation Safe Schools are **Black**. *Id*

17 B. Geographic Area of the Tenderloin

18 Press releases by the USAO stated that Operation Safe Schools focused on San
 19 Francisco’s Tenderloin neighborhood. Phillips Related Case Decl., Att. C [12.09.13 USAO
 20

21 ¹⁵ Section 860 applies to drug-trafficking crimes occurring within 1,000 feet of “the real property
 22 comprising a public or private elementary, vocational, or secondary school or a public or private
 23 college, junior college, or university, or a playground or housing facility owned by a public
 24 housing authority.” 21 U.S.C § 860(a). It also applies to drug-trafficking crimes occurring
 25 “within 100 feet of a public or private youth center, public swimming pool, or video arcade
 26 facility.” *Id.*

27 ¹⁶ California law similarly provides an enhanced sentence for persons trafficking drugs within
 28 1,000 feet of an educational institution (“elementary, vocational, junior high, or high school”).
 Cal. H&S Code § 11353.6. Section 11353.6, however, does **not** provide a mandatory minimum
 sentence. *See* Cal. H&S Code § 11353.6(f).

1 Press Release]; Att. D [2.12.15 USAO Press Release]. There are a number of different ways to
 2 define the Tenderloin neighborhood. SFPD's Tenderloin police district is currently bounded by
 3 the area between Geary Street, Powell Street (between Geary and Market), Market Street, 3rd
 4 Street, Mission Street, South Van Ness Avenue, Larkin Street (between Market and Golden Gate
 5 Ave., and Polk St. (between Golden Gate and Geary). Ex. 6, Declaration of August Sommerfeld
 6 in Support of Motion to Compel Discovery on Selective Prosecution and Enforcement
 7 ("Sommerfeld Disco. Mtn. Decl."), Att. A at Ex.02868, 02874 (map of Tenderloin police
 8 district). Prior to July 2015, SFPD's Tenderloin District was bounded by Larkin Street, Geary
 9 Street, and Market Street. *See id.* at Ex.02868-73, 02875 (prior map and SFPD General Order
 10 1.02). Both before and after July 2015, the Northern police district included the area north of
 11 Geary Street. *See id.* Before July 2015, the border between the Tenderloin and Southern police
 12 districts ran along Market Street; it now runs primarily along Mission St. *See id.*

13 In court proceedings for Operation Safe Schools cases, the USAO has defined the
 14 Tenderloin neighborhood as the "area bounded by Geary Blvd., Van Ness Ave., Howard Street,
 15 Fifth Street and Powell Street." Order Setting Conditions of Release as to Matthew Mumphrey
 16 [Docket No. 4]. This area encompasses parts of the Tenderloin, Northern and Southern police
 17 districts. *Cf.* Ex. 6, Sommerfeld Disco. Mtn. Decl., Att. A at Ex.02869-73. Based on the SFPD
 18 District boundaries in effect when the incidents underlying the thirty-seven Operation Safe
 19 School cases occurred (*i.e.*, 2013-14), thirty-five such defendants were arrested for selling drugs
 20 in the Tenderloin District, and two were arrested for selling drugs in the Southern District. *See*
 21 Ex. 6, Sommerfeld Disco. Mtn. Decl., Att. F. For the purposes of this motion, however, the
 22 defense has defined the Tenderloin neighborhood in the same manner as the USAO has defined
 23 it in Court: the area bounded by Geary Street, Van Ness Ave. (south and north of Market Street),
 24 Howard Street, Fifth Street and Powell Street. Based on the foregoing definition of the
 25 Tenderloin, the incidents underlying all thirty-seven Operation Safe Schools cases occurred in
 26 the Tenderloin. *See id.*

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1 Further, as illustrated by a map created by the Federal Public Defender's Office ("FPD"),
 2 almost every area of the Tenderloin falls within 1,000 feet of a playground or educational
 3 institution (elementary, secondary, vocational, and post-secondary) that apparently would be
 4 subject to 21 U.S.C. § 860(a). *See* Ex. 6, Sommerfeld Disco. Mtn. Decl. ¶ 10 & Att. D at
 5 Ex.02931 (describing and displaying map that contains pins marking the locations of various
 6 playgrounds and educational institutions and 1,000-foot-radii circles drawn around those
 7 locations). The only exception appears to be an approximately one-block-wide area that runs
 8 along 8th Street from just north of Mission to Howard Street. *See id.*

9 As noted above, the defense mapped the location for each of the incidents underlying the
 10 charges against the thirty-seven Operation Safe Schools defendants. *See* Ex. 6, Sommerfeld
 11 Disco. Mtn. Decl., Atts. E & F at Ex.02932-34. The defense has also created a map displaying
 12 the arrest location for all non-Black individuals charged with drug-trafficking crimes in San
 13 Francisco Superior Court between January 1, 2013 and February 28, 2015 – as contained in a
 14 dataset obtained from the Court Management System ("CMS") for the San Francisco Superior
 15 Court.¹⁷ *See* Ex. 6, Sommerfeld Disco. Mtn. Decl. ¶ 9 & Att. C at Ex.02926-30. As a
 16 comparison of the two maps makes clear, the arrest locations for non-Black individuals charged
 17 with drug-trafficking crimes in San Francisco Superior Court are intermingled extensively with
 18 the locations of the incidents underlying the charges against the thirty-seven Operation Safe
 19 Schools Defendants.

20 C. Types and Amounts of Drugs

21 The focus of Operation Safe Schools was on very low-level street drug dealers. The
 22 drugs sold include cocaine base, heroin, oxycodone, roxicodone and methamphetamine. Ex. 3,
 23 Cruz Disco. Mtn. Decl., Att. A at Ex.02851-52.

24 The quantity of drugs involved in Operation Safe Schools cases was minimal. For

26 ¹⁷ A description of the CMS dataset is set forth in Section III *infra*.

1 example, of the 2013 Operation Safe Schools cases in which the client was represented by the
 2 Federal Public Defender (and thus the defense was able to examine the PSR or the plea
 3 agreement), the Base Offense Level used for the natural guideline calculations was the lowest
 4 possible level, level 12 - reflecting the lowest possible quantity of drugs (less than 1.4 grams in
 5 the case of crack cocaine).¹⁸ Declaration of Megan Wallstrum In Support Of Notice Of Related
 6 Case ("Wallstrum Related Case Decl."), Att. L, ¶ 2, *United States v. Chrystal Anthony*, No.
 7 15cr005 (N.D. Cal. filed 03/31/15) [Docket No. 11-4). This is also true for the 2014 cases in
 8 which sentencing has occurred and for which the FPD is able to examine the PSR. Ex. 4,
 9 Declaration of Megan Wallstrum in Support of Motion to Compel Discovery on Selective
 10 Prosecution and Enforcement ("Wallstrum Disco. Mtn. Decl."), ¶ 2, Att. A at Ex.02855.

11 Typically, drug cases involving this small quantity of drugs are not charged in federal
 12 court, and - prior to Operation Safe Schools - rarely charged in the Northern District of
 13 California. Statistics from the United States Sentencing Commission show that nationally only
 14 2.4% of crack offenders had a Base Offense Level of 12 in 2013. In the Ninth Circuit, that rate
 15 was 2.5%. In the five years preceding Operation Safe Schools, only two people in the Northern
 16 District of California, who were sentenced for trafficking in crack cocaine, had base offense
 17 levels of 12 (for a rate of 1.2% of offenders). Phillips Related Case Decl., Att. E.¹⁹

18 D. How the DEA/SFPD Conducted Operation Safe Schools

19 The facts underlying all the Operation Safe Schools cases are similar.²⁰ For the 2013

20 ¹⁸ In some of the PSRs, the Base Offense Level was calculated at Level 14 because the two-point
 21 increase in § 2D1.2 for selling drugs within 1,000 feet of a protected location was included in the
 22 Base Offense Level. However, the level corresponding to the amount of drugs was always 12.
 23 Wallstrum Related Case Decl., ¶2.

24 ¹⁹ In fact, the Central District of California and the District of Columbia have both stated that
 25 they generally do not prosecute crack cases involving less than 50 grams of crack. Phillips
 26 Related Case Decl., Att. J at 16. The Operation Safe School cases which, as explained above,
 27 have a Base Offense Level of 12, involve less than 1.4g of crack cocaine. Wallstrum Related
 28 Case Decl., Att. L; U.S.S.G. § 2D1.1.

29 ²⁰ The reports from the above-captioned Operation Safe Schools cases are appended as
 30 Attachment H of the Phillips Related Case Decl.

1 sweep, the majority of the cases used an undercover informant named “Jimmy” who bought
 2 drugs from targets. The transactions were recorded using a body camera. For the 2014 sweep,
 3 the DEA/SFPD used video surveillance of the designated target. In the videos, it appears the
 4 officers were stationed on either a nearby rooftop or a building, observing, and video-recording a
 5 specific area of the Tenderloin in which drug selling was allegedly occurring. The officers can
 6 oftentimes be heard on the video pointing out the target of the operation. Declaration of Cary
 7 Davalos In Support Or Notice Of Related Case, (“Davalos Related Case Decl.”), ¶ 2, *United*
 8 *States v. Chrystal Anthony*, No. 15cr005 (N.D. Cal. filed 03/31/15) [Docket No. 11-5].

9 Once the target of the operation was identified on video, the officers executed one of two
 10 approaches. Either an undercover officer, sometimes wearing a body camera, bought a small
 11 amount of narcotics from the target, or the officers videotaped a few apparent hand-to-hand
 12 transactions between the target and alleged drug buyers, stopped an alleged buyer soon after an
 13 apparent hand-to-hand transaction, and seized illegal narcotics from the buyer. Davalos Related
 14 Case Decl., ¶ 2. The majority of the targets were not arrested on the day of these operations.
 15 Rather, the DEA/SFPD typically made no contact with the targets, but instead arrested them on a
 16 later date on federal arrest warrants and brought them directly to federal court. Declaration of
 17 Sheree Cruz-Laucirica In Support of Notice of Related Case (“Cruz Related Case Decl.”), ¶4,
 18 *United States v. Chrystal Anthony*, No. 15cr005 (N.D. Cal. filed 03/31/15) [Docket 11-3].

19 E. Officers

20 At least forty-six law enforcement officers were involved in Operation Safe Schools.
 21 Thirty-four were SFPD officers and 1 was a Daly City officer; ten were DEA officers, and one
 22 was a U.S. Marshal assigned to the DEA. Declaration of Rob Ultan In Support of Notice Of
 23 Related Case (“Ultan Related Case Decl.”), ¶¶ 2-3, *United States v. Chrystal Anthony*, No.
 24 15cr005 (N.D. Cal. filed 03/31/15) [Docket No. 11-6]; Declaration of August Sommerfeld In
 25 Support Of Notice Of Related Case (“Sommerfeld Related Case Decl.”), Att. A (graphs showing
 26 officer involvement), *United States v. Chrystal Anthony*, No. 15cr005 (N.D. Cal. filed 03/31/15)
 27

1 [Docket No. 11-1]. At least some of the SFPD officers involved in Operation Safe Schools were
 2 cross-designated as federal agents. Declaration of Galia Amram Phillips In Support Of Reply to
 3 Motion to Preserve Evidence, (“Preservation Reply Decl.”) Exs. A-B, *United States v. Chrystal*
 4 *Anthony*, No. 15cr005 (N.D. Cal. Filed 07/13/15) [Docket No. 42]; Phillips Related Case Decl.,
 5 Att. H.

6 Most of the Operation Safe Schools cases were generated by the same DEA and SFPD
 7 officers. For example, seven officers were involved in at least twenty of the thirty-seven cases.
 8 One officer was involved in thirty of the thirty-seven cases, while a second officer was involved
 9 in twenty-nine cases. Ultan Related Case Decl., ¶¶ 2-3; Sommerfeld Related Case Decl., Att. A.

10 F. Standards for Prosecution

11 On July 16, 2015, the U.S. Attorney’s Office filed declarations from five Assistant
 12 United States Attorneys (“AUSAs”) regarding the charging criteria and process for Operation
 13 Safe Schools. The government stated that “Operation Safe Schools grew out of [the prosecutor
 14 who initiated the Operation’s] long-term familiarity with the Tenderloin, its residents, and the
 15 drug dealing that occurred there.” United States’ Motion Seeking Ruling On Defendants’ Claim
 16 That The Government Engaged In Selective Enforcement and Prosecution at 6:14-16 (“Mtn.
 17 Seeking Ruling.”) [Docket No. 51]. The government said they told law enforcement to “target
 18 recidivist, repeat offenders who were selling drugs near schools and to concentrate on the
 19 criminal history of the defendants.” *Id.* at 6:20-22.

20 The government further claims that the two supervisory AUSAs were not aware of the
 21 race of any defendant before authorizing prosecution. *Id.* at 7:1-6. AUSA Hasib, who initiated
 22 Operation Safe Schools, says he too did “not know of the race of most of the defendants
 23 prosecuted in Operation Safe Schools.” *Id.* at 6:18-19. However the rap sheet – and often the
 24 police incident report – state the race of the defendant. *See* Phillips Related Case Decl.,
 25 Attachment H (police reports of Operation Safe Schools defendants); Ex. 41, Declaration of
 26 Galia Amram Phillips in Support of Motion to Compel Discovery on Selective Prosecution and
 27

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1 Enforcement (“Amram Disco. Mtn. Decl.”), Att. A at Ex.03094-04144.

2 The two line AUSAs for the 2014 sweep, Sarah Hawkins and Lloyd Farnham, do not
 3 claim that were unaware of the race of the defendants before prosecuting them. Declaration of
 4 Sarah Hawkins In Support Of United States’ Motion (“Hawkins Decl.”) [Docket No. 51-1];
 5 Declaration of Lloyd Farnham In Support Of United States’ Motion (“Farnham Decl.”) [Docket
 6 No. 51-2]. The Government did not provide declarations for the line AUSAs from the 2013
 7 sweep. Moreover, the line AUSAs who brought the cases in the 2014 sweep declare that for
 8 each of the cases they brought, they were “provided an account of the individual’s conduct
 9 memorialized in a Drug Enforcement Administration Form 6, surveillance video of the drug buys
 10 taken by the San Francisco Police Department, and the criminal history of each defendant.”
 11 Hawkins Decl., ¶ 5; Farnham Decl., ¶ 5.

12 G. Criminal History of Operation Safe School Defendants

13 The criminal history of the thirty-seven Operation Safe School defendants is a wide
 14 range. While there are certainly defendants with substantial criminal history, others have
 15 minimal criminal history.²¹ Jahnai Carter has no adult criminal convictions. Ex. 41, Amram
 16 Disco. Mtn. Decl., ¶¶ 2-4. Darlene Rouse has one adult conviction, for misdemeanor petty theft,
 17 for which she got a fine and possibly one day in jail. *Id.* at Att. A, Ex.03416; Ex. 2, Ultan Disco.
 18 Mtn. Decl., ¶ 2, Att. A at Ex.02234-43. William Brown and Ashley Pharr both have one prior
 19 drug-trafficking conviction, but they are out of Alameda County, not the Tenderloin. *Id.* at
 20 Ex.04134-44, Ex.03094-3105. Darrell Powell has criminal history, but none of it is for drug
 21 trafficking. *Id.* at Ex.03383-03407. Matthew Mumphrey has one prior drug-trafficking
 22

23
 24 ²¹ All of the Operation Safe Schools defendants’ rap sheets in possession of the Office of the
 25 Federal Public Defender are attached as Att. A to the Amram Disco. Mtn. Declaration (Exhibit
 26 41). Attachment A to the Ultan Disco. Mtn. Declaration (Exhibit 2) is a chart summarizing their
 27 criminal history.

conviction, for which he received six months in jail, but it is thirteen years old. His only other conviction is eight years old, and it is for possession of an opium pipe. *Id.* at Ex.03739-64.

Jamella Jules falls within Criminal History Category (CHC) II of the U.S. Sentencing Guidelines, with only one prior drug trafficking conviction from 2002. *Id.* at Ex.03548-91.

Shavon Gibson is CHC I, with only one prior conviction of any kind, a drug-trafficking conviction from 2005. *Id.* at Ex.03969-95. Shaneka Clay is CHC II based on one prior drug-trafficking conviction from 2002 (a 1998 conviction was too old to count). *Id.* at Ex.03937-68.

II. Racial Demographics of Drug Traffickers in the Tenderloin

A. Needle Exchange Survey

In the spring of 2015, two experts hired by the Federal Public Defender's Office, Sheigla Murphy²² and Katherine Beckett²³ designed a survey to be administered to active drug users accessing services in the Tenderloin. The surveys were administered at the Tenderloin Needle Exchange site of the San Francisco AIDS Foundation's Needle Exchange Program with the help and supervision of Lisa Morelli, Tenderloin Site Coordinator. The site provides needle exchange supplies as well as equipment used by crack-smoking clients. A variety of services are also offered at the site. Dr. Murphy was responsible for training surveyors to conduct the survey and supervised the administration of survey for the first three weeks of data collection. Ex. 41,

²² Dr. Sheigla Murphy is the Director of the Center for Substance Abuse Studies for the Institute for Scientific Analysis in San Francisco. She received her B.A. from San Francisco State University in Interdisciplinary Social Sciences, and received her Ph.D. in Medical Sociology from the University of California, San Francisco. She has received over 25 research grants and published several books and numerous articles on sociological aspects of drug use. *See* Ex. 41, Amram Disco. Mtn. Decl., Att. M at Ex.04194-04211.

²³ Dr. Katherine Beckett is a professor in the Law, Societies & Justice Program and Department of Sociology at the University of Washington in Seattle. She received her B.A. degree from University of California, San Diego, and earned a Master's Degree and her Ph.D. from the University of California, Los Angeles. She has taught at the University of Washington since 2000, and previously taught in several other undergraduate programs around the country. Dr. Beckett has also published books and numerous articles regarding sociological aspects of crime and punishment. *See* Ex. 41, Amram Disco. Mtn. Decl., Att. L at Ex.04177-92.

1 Amram Disco. Mtn. Decl., Att. M at Ex.04216.

2 The survey was conducted on seven consecutive weeks and was administered by research
 3 assistants currently assisting Dr. Murphy with other ongoing research projects. Nicholas Lau,
 4 Sye Ok Sato, Fiona Murphy, and Sheigla Averill were trained extensively in human subject
 5 protections prior to conducting these surveys and were trained specifically for the Tenderloin
 6 needle exchange surveys by Dr. Murphy. *Id.* The purpose of the survey was to acquire
 7 additional information regarding the race/ethnicity of those who buy and sell illicit substances in
 8 the Tenderloin neighborhood. In the survey, respondents were asked to recall up to six recent
 9 drug transactions that took place in the Tenderloin neighborhood and to identify the
 10 race/ethnicity of the person from whom they obtained those drugs. Respondents were allowed to
 11 identify up to three racial categories for each drug seller. If the respondent identified either the
 12 first or second race of a drug dealer as “black,” that dealer was included in the Black category.
 13 In total, survey respondents provided information about 440 drug transactions. FPD staff then
 14 mapped each intersection/location provided by the respondents to verify that the reported drug
 15 transaction described occurred in the Tenderloin neighborhood. Through this process, fifteen
 16 surveys were excluded from the analysis. *Id.* at Ex.04217.

17 The data analysis showed that fifty-six percent of the Tenderloin drug transactions
 18 identified by survey respondents involved Black drug sellers. One-fifth (20%) of these drug
 19 transactions involved Latino drug sellers and about one in six (16.8%) involved White drug
 20 sellers. Because 100% of Operation Safe School defendants are Black, this results in a Z-score
 21 of 13.7%.²⁴ *Id.* at Ex.04221. As a result, Dr. Beckett concludes: “Statistical analyses indicates

22 ²⁴Conventionally, social scientists consider a difference between two proportions to be
 23 statistically significant if there is a 5 percent or smaller probability that the observed difference is
 24 the result of chance. To measure the statistical significance of such differences, researchers often
 25 calculate a Z score that can be translated into a probability. Z scores are an appropriate measure
 26 of the statistical significance of differences between means when the sample sizes are large (*i.e.*,
 over 30). The formula used to calculate Z scores takes into account both the magnitude of the
 difference between proportions and the sample size. Amram Disco. Mtn . Decl., Att. M at
 Ex.04217. Z scores with an absolute value of 2 or more are considered statistically significant,
 meaning that the observed difference is very unlikely to be the result of chance. *Id.* at Ex.04219.

1 that these differences are highly statistically significant and extremely unlikely to be the product
 2 of chance.” *Id.* at Ex.04222.

3 B. Interviews of Tenderloin Community Members

4 The results of the Needle Exchange Survey are consistent with declarations from people
 5 who work and live in the Tenderloin. Leo Martinez is the Albert Abramson Professor of Law at
 6 U.C. Hastings College of Law, where he has been employed since 1985. Ex. 25, Declaration of
 7 Leo Martinez, ¶ 1 [Ex.03013-19]. Prior to joining U.C. Hastings, Professor Martinez served his
 8 country as both a member of the U.S. Army JAG Corps and as an AUSA. *Id.* at ¶ 2. From his
 9 current office, Professor Martinez has windows facing out on Golden Gate Avenue and its
 10 intersection with Hyde Street. *Id.* at ¶ 6-7. Based upon his observations, “the races of those
 11 engaged in what appears to be drug activity on this corner are two-thirds African American and
 12 one-third Hispanic. This has remained pretty much constant over the years of my observations.”
 13 *Id.* at ¶ 8. Professor Martinez has also noticed San Francisco Police Department officers in the
 14 hallway outside of his current office location (and on a few occasions they have used his office)
 15 looking through the windows in the direction of the drug sales activity occurring on the
 16 northwestern corner of Golden Gate Avenue and Hyde streets. *Id.* at ¶ 9.
 17

18 Arthur Sandoval is a security guard at this federal courthouse at 450 Golden Gate Ave.,
 19 and at 50 U.N. Plaza, where the majority of his shifts take place. As part of his job, he walks
 20 around the perimeter of the building to ensure that it is safe and secure. The building is in close
 21 proximity to Civic Center BART station and U.C. Hastings College of the Law. Mr. Sandoval
 22 has observed substantial drug trafficking occur directly in front of, and around, 50 U.N. Plaza.
 23 “The drug trafficking is constant there.” Ex. 26, Declaration of Arthur Sandoval, ¶¶ 1-3
 24 (Ex.03020-25). Based on his own observations while working at 50 U.N. Plaza:
 25

26 the vast majority of drug dealers in the area are Hispanic. They’ve dominated the
 27 drug trafficking there for the entirety of the time that I have worked at this
 28 location. In addition, Hispanics appear to dominate the drug trafficking within a
 three to four block radius of the federal building. The majority of these drug

1 dealers are young and consist of both men and women. Some of them appear
 2 organized in that they work in pairs and they use the physical landscape such as
 3 bushes to hide their drugs in. I have also observed drug dealers conceal narcotics
 4 inside of their mouths. Crack cocaine is one of the more popular drugs that is
 5 sold there.... The San Francisco Police Department is aware of the drug
 6 trafficking that takes place near 50 UN Plaza. They conduct surveillance of the
 drug trafficking from inside the building. They have access to a room that is
 located on the first floor. The room has two large windows with a clear view of
 the courtyard that is directly in front of the building. The courtyard is where the
 majority of the drug trafficking takes place near the building.

7 *Id.* at ¶¶ 4-5.

8 Paul Harkin is the program manager for GLIDE Health Services HIV and Hepatitis C
 9 programs. He has worked in the Tenderloin for fifteen years. As part of his job, he runs street
 10 outreach in the Tenderloin, checking on participants and offering sterile syringes. Ex. 32,
 11 Declaration of Paul Harkin, ¶¶ 1-3 (No. Ex.03047-52). He declares that “there has always been,
 12 and continues to be, a diversity in the racial and ethnic makeups of the persons I have witnessed
 13 dealing controlled substances in the Tenderloin. Some are white, some black, some Latino, some
 14 Asian and some Pacific Islanders.” *Id.* at ¶ 5. Moreover, Harkin has “found that drug dealers of
 15 the same ethnic group tend to work the same areas of the Tenderloin. For example, most
 16 recently, Leavenworth has Honduran and Mexican drug dealers, Golden Gate Avenue has
 17 Whites and African Americans above Jones Street and just African Americans at Jones Street
 18 and below, and Hyde Street has Mexicans regularly dealing there.” *Id.* at ¶ 7.

19 Deanna Brown has worked in the Tenderloin for over ten years. She currently works at
 20 the Elk Hotel at 670 Eddy Street. Ex. 27, Declaration of Deanna Brown, ¶ 1 (Ex.03026-28). She
 21 states:

22 While employed at the Elk Hotel, I have observed substantial drug trafficking
 23 activity in front of and near the hotel. Specifically, for the past five years or
 24 more, I have witnessed Latino men and women sell drugs in front of and near the
 25 hotel on a daily basis ... The Latino men and women who sell drugs near the Elk
 26 Hotel appear to be organized in shifts. That is, during the day time, there is a
 27 particular group of seven to eight males and three to four women that sell drugs in
 front of and near the hotel. Towards the evening, a different group of
 approximately twelve males and two females replaces that day time group and

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1 continue to engage in drug trafficking. I have also witnessed at least two
 2 Caucasian individuals regularly sell methamphetamine to white patrons or
 3 residents of the Elk Hotel. I have contacted the San Francisco Police Department
 4 on numerous occasions to report drug activity in front of the Elk Hotel, because
 5 hotel management understandably does not want drug activity to occur in front of
 6 or near the premises. Because the Elk hotel has a video surveillance system
 7 focused on Eddy Street, I have regularly been able to witness drug trafficking
 8 activity and safely report it to the San Francisco Police Department. In the past, I
 9 have asked the various Latino drug dealers to please move away from the Elk
 Hotel and to sell their drugs elsewhere. In response to this and my repeated
 telephone calls to the police, condiments and trash was placed or thrown on my
 car. The drug activity and race of persons who sell drugs near the Elk Hotel has
 not changed significantly since the fall of 2013. Latino drug dealers have
 dominated the drug trafficking in that area for the entirety of the time that I have
 worked at the Elk Hotel.

10 Ex. 27, Declaration of Deanna Brown, ¶¶ 2-7.

11 Tabitha Allen has been employed at the Tenderloin Housing Clinic (THC) in San
 12 Francisco, California since 2009, where she is currently the Director of Programs at THC.
 13 Initially, she worked at THC's office at 398 Eddy Street but in 2001, she moved to working in
 14 THC's office space at 449 Turk Street. Ex. 28, Declaration of Tabitha Allen, ¶¶ 2-6 (Ex.03029-
 15 33). She declares:

16

17 Throughout my many years in the Tenderloin I have observed that there are
 18 different racial groups involved in the local drug trade. They do not mix with one
 19 another, often African American dealers control one block while Hispanic dealers
 control another.

20

21 While working at THC's Eddy Street office I typically walked up from the BART
 22 station via Leavenworth Street. During my walk up Leavenworth I was aware
 23 that drug dealers were selling drugs. These blocks were primarily occupied by
 24 African American people selling drugs.

25

26 When I moved to THC's Turk Street location in 2011 I began walking up Hyde
 27 Street to get to work. There are a lot of Hispanic dealers on the blocks between
 28 BART and Turk Street.

29

30 THC has managed the Edgeworth Hotel on O'Farrell Street since 2013. We have
 31 managed the Elk Hotel at Polk Street since 2006. During my time at THC,
 32 Hispanic dealers have been present in both these areas.

33

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1 Enforcement of the drug trade in the Tenderloin varies based on who is placing
 2 pressure on the police. THC has tried to build good relationships with the police
 3 in order to receive attention when we need policing in front of our buildings.
 Typically, they will be responsive and present for a week or some period of time,
 until things return to normal and then we ask for help again.

4 Ex. 28, Declaration of Tabitha Allen, ¶¶ 2-6.

5 **III. Racial Demographics of Tenderloin Drug Traffickers Charged in State Court**

6 In addition to analyzing the needle exchange survey discussed at section II.A *supra*, Dr.
 7 Beckett analyzed charging data from San Francisco County Superior Court with respect to drug-
 8 trafficking crimes between January 1, 2013 and February 28, 2015. The data Dr. Beckett
 9 analyzed was provided by the FPD, which obtained the data from the Court Management System
 10 (“CMS”) for the San Francisco County Superior Court. The CMS is a database which serves as
 11 the repository for all data related to the processing of criminal cases, filed in San Francisco
 12 County Superior Court, from the time of arrest until the time of disposition. Ex. 40, Declaration
 13 of William Roth (“Roth Decl.”) ¶ 1 at Ex.03084-88. Among other things, the CMS includes data
 14 regarding the race of each defendant. *See id.* ¶ 3. With the sponsorship of the San Francisco
 15 Public Defender’s Office, the FPD requested a CMS report/spreadsheet listing drug-trafficking
 16 cases charged in San Francisco (citywide) between January 2009 and April 2015. *Id.* ¶ 4-5; Ex.
 17 1, Koeninger Disco. Mtn. Decl. ¶ 6. For purposes of the report/spreadsheet, the FPD defined
 18 “drug-trafficking case” as any case charging any of the following code sections:
 19

- 20 • California Health & Safety Code section 11351
- 21 • California Health & Safety Code section 11351.5
- 22 • California Health & Safety Code section 11352
- 23 • California Health & Safety Code section 11358
- 24 • California Health & Safety Code section 11359
- 25 • California Health & Safety Code section 11360
- 26 • California Health & Safety Code section 11375

- 1 • California Health & Safety Code section 11378
- 2 • California Health & Safety Code section 11378.5
- 3 • California Health & Safety Code section 11379

4 Ex. 40, Roth Decl. ¶ 4; Ex. 1, Koeninger Disco. Mtn. Decl. ¶ 6. These code sections prohibit
5 trafficking of various controlled substances, including possession of a controlled substance for
6 sale. The CMS report/spreadsheet requested by the FPD also included data, for each case,
7 regarding the following:

- 8 • Court Number
- 9 • Arrest Date
- 10 • Arrest Location
- 11 • SFPD Incident Number
- 12 • Defendant's Name
- 13 • Defendant's Race
- 14 • Filed Charge
- 15 • Current Charge

16 Ex. 40, Roth Decl. ¶ 4; Ex. 1, Koeninger Disco. Mtn. Decl. ¶ 6.

17 The FPD received the completed CMS report/spreadsheet in September 2015. *See* Ex.
18 40, Roth Decl. ¶ 5; Ex. 1, Koeninger Disco. Mtn. Decl. ¶ 7. In order to combine the CMS data
19 with important information about the arrests underlying each drug-trafficking case reflected
20 therein, FPD staff obtained SFPD incident data from the City of San Francisco's "SF OpenData"
21 website, which is self-described as "the central clearinghouse for data published by the City and
22 County of San Francisco."²⁵ *See* Ex. 6, Sommerfeld Disco. Mtn. ¶ 4. FPD staff downloaded
23 data regarding all drug/narcotic incidents that occurred between January 1, 2013 and February
24 28, 2015; included in the downloaded data was the SFPD incident number for each incident, as
25

26 ²⁵ See <https://data.sfgov.org/> (lasted visited November 25, 2015)

1 well as its geographic coordinates. *See id.* ¶¶ 4-6. Using software designed for statistical
 2 analysis (SPSS), FPD staff then used the SFPD incident number to merge the CMS data and the
 3 SFPD incident data. *See id.*

4 After merging these datasets, FPD staff first removed from the CMS data all cases that
 5 were not associated with incidents occurring between January 1, 2013 and February 28, 2015
 6 (because unlike the data downloaded from the SF OpenData website, the CMS data was not
 7 limited to these dates). *Id.* ¶ 7. Next, to isolate cases that stemmed from incidents that took
 8 place in the Tenderloin neighborhood, FPD staff removed all data entries that fell outside of the
 9 relevant geographic coordinates (using the northernmost, easternmost, southernmost and
 10 westernmost points of the Tenderloin).²⁶ *See id.* (detailing this process). FPD staff then
 11 imported the resulting dataset into a computer program named Tableau, which allowed the FPD
 12 to see each data point on a map (and, therefore, in relation to Tenderloin street boundaries). *See*
 13 *id.* FPD staff manually eliminated any data point that fell outside of the street boundaries of the
 14 Tenderloin. *Id.* Finally, FPD staff identified 248 entries contained in the CMS data that did not
 15 have a corresponding match in the SF OpenData (and, therefore, were not paired with the
 16 geographic-coordinate data from the SF OpenData website). *See id.* ¶ 8. However, the CMS
 17 data did contain arrest-location data; using this data, FPD staff manually researched the arrest
 18 location for each of the 248 entries using Google Maps. *Id.* If the arrest location fell within the
 19 geographic area of the Tenderloin (as defined above), that case was retained. *See id.*

20 The result of the foregoing was a dataset that included information regarding CMS drug-
 21 trafficking cases that were: (a) charged in San Francisco Superior Court between January 1, 2013
 22 and February 28, 2015; and (b) based on SFPD incidents that occurred in the Tenderloin. This
 23 dataset/spreadsheet of CMS data was provided to Dr. Beckett, who analyzed the data. *See* Ex. 1,

24 ²⁶ For the reasons explained *supra* at Background Section I.B, FPD staff defined the
 25 “Tenderloin” as the area bounded by the following: Van Ness Avenue (north and south of
 26 Market Street); Geary Boulevard; Powell Street; 5th Street; and Howard Street. FPD staff used
 Google maps to find the northern, southern, western, and eastern most points of the above-
 described boundaries (37.787924, 37.770202, -122.422042, -122.404582).

1 2013 and February 28, 2015. *Id.* A discussion of Dr. Beckett's analysis follows.

2 The racial categories employed by the CMS data include: Black, White, Japanese,
 3 Chinese, Mexican, Filipino, Other and Unknown. *Id.*; *see also* Ex. 40, Roth Decl. ¶ 3 at
 4 Ex.03084-88 (describing common race codes contained in CMS). The race of the suspect was
 5 not identified (i.e. unknown) in a non-trivial number of arrests (56, or 6.9% of all arrests). Ex.
 6 41, Amram Disco. Mtn. Decl., Att. M at Ex.04215. In order to identify Hispanics that were
 7 racially classified as White, Other or Unknown, Dr. Beckett employed Hispanic Surname
 8 Analysis (HAS) to estimate the proportion of SFPD arrestees in these racial categories who
 9 identify as Latino. This program utilizes the U.S. Census Spanish Surname database and assigns
 10 a numeric value between 0 and 1 to all surnames in that database. These numeric values
 11 represent the probability that a given surname corresponds to persons who identified themselves
 12 as Hispanic/Latino in the 1990 U.S. Census.²⁷ The list used to identify defendants of Hispanic
 13 origin here contains 12,497 different Spanish surnames that are classified by the Census Bureau
 14 as "Heavily Hispanic." The resulting Latino category includes two groups of people: 1) people
 15 who were racially classified by SFPD as Mexican; and 2) people who were racially identified as
 16 White, Other, or unknown, but were identified as Hispanic through HSA. *Id.*

17 Data analysis indicates that a majority (61.4%) of those arrested in the Tenderloin in the
 18 relevant time period and subsequently charged in Superior Court with drug trafficking are Black.
 19 Approximately one-fourth (24.7%) of these arrestees were Latino, and just over one in ten (10.7
 20 percent) were White. Thus, while approximately six of ten arrestees charged with drug
 21 trafficking in San Francisco County Superior Court were Black, all of those arrested through
 22 Operation Safe Schools and facing federal charges were Black. Table 1 below assesses the
 23 statistical significance of this difference in proportions.

24 //

25 ²⁷ Word, David L., & R. Colby Perkins Jr., BUILDING A SPANISH SURNAME LIST FOR THE 1990s
 26 (A NEW APPROACH TO AN OLD PROBLEM), Technical Working Paper No.13. Washington, D.C.:
 Population Division, U.S. Census Bureau, 1996.

27

1
2 **Table 1. Statistical Significance of Difference between the Proportion of Operation**
3 **Safe Schools Arrestees and SFPD Arrestees Charged in Superior Court who are Black**

	Operation Safe School Arrestees	SFPD Arrestees Charged in Superior Court	Absolute Difference in Percent Black	Z-Score
Black Proportion	100% (37/37)	61.4% (489/796)	38.6% (100%-61.4%)	17.5*

7 *Indicates a statistically significant disparity ($Z>2$ or $Z<-2$).
8

9 Beckett explained that Z scores with an absolute value of 2 or more are considered
10 statistically significant, meaning that the observed difference is very unlikely to be the result of
11 chance. The Z –Score shown in Table 1. (17.5) means that the difference in the proportion of
12 Operation Safe School and Superior Court drug trafficking arrestees who are Black is highly
13 statistically significant, and that there is virtually no chance that this difference is the result of
14 chance. *Id.* at Ex.04217-19.
15

IV. Law Enforcement Knowledge of Non-Black Drug Traffickers in the Tenderloin

16 In addition to the above-discussed evidence demonstrating the racial diversity of drug
17 traffickers in the Tenderloin, there is substantial evidence that SFPD was aware of the consistent
18 presence of non-Black drug traffickers in the Tenderloin. This is particularly true with respect to
19 Hispanic/Latino drug traffickers. Indeed, various incident reports obtained by the FPD
20 demonstrate SFPD's particular awareness of the presence, behavior, and specific geographic
21 locations frequented by Hispanic/Latino dealers.
22

23 For example, multiple SFPD incident reports describe drug-trafficking along Hyde Street
24 as generally controlled by Hispanic dealers. As explained by one officer working an April 2013
25 plainclothes detail in “the 200 block of Hyde Street”:

26 I have participated in hundreds of buys [sic] busts and surveillances in this area. I
27 know that many of the drug dealers in the Hyde Street area are of Honduran
28 descent. I have seen the described behavior hundreds of times. I know the drug
29 dealers in the area keep the dope in their mouth in order to conceal and protect it.
30

1 Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00773. *See also id.* at Ex.00736 (officer
2 reporting in April 2015 that “[b]ased off prior arrests and contacts, I know that the corner of
3 Eddy Street and Hyde Street is primarily controlled by Honduran national drug dealers”).

4 While describing his September 2013 investigation of a “group of five Hispanic men”
5 standing at the corner of Eddy and Hyde Streets, another SFPD officer described the area as
6 follows:
7

8 Over the last three years I have personally witnessed numerous Hispanic
9 individuals that stand on that street corner for hours at a time. I have personally
10 witnessed the same individuals stand on that street corner from the time I start
work at 2100 hrs and the same individuals are there at 0400 hrs in the morning. I
11 have directed Tenderloin officers to focus their attention on the drug dealers on
that corner and the officers have made numerous drug arrests there.

12 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00539.

13 The corner of Golden Gate Avenue and Hyde Streets was similarly known to SFPD for
14 the presence of Hispanic drug dealers. As one officer explained in August 2014:
15

16 I responded to the area of Golden Gate and Hyde St. on a report of multiple drug
dealers in the area. Tenderloin Police Station receives several complaints
17 everyday [sic] regarding narcotics sales and use in this area. Officer Celis and I
have made multiple arrests in this area for narcotics sales in specific to [sic] base
18 rock cocaine. Officer Celis and I have also spoken to multiple business owners
19 and residents in the area who have complained that they feel threatened by Latin
drug dealers who blatantly sell “Crack” on the streets.

20 *Id.* at Ex.00272. Hispanic drug dealers were known to frequent other nearby areas, too:
21

22 We traveled by a donut store located on the northeast corner of Golden Gate
Avenue and Larkin Street. The area of Golden Gate Avenue and Larkin Street is
23 an area that is well known for narcotics sales. Northern Station receives numerous
complaints regarding Hispanic males selling crack cocaine on Golden Gate
24 Avenue between Polk Street and Van Ness Avenue. Officer Peterson and I have
seen many of the suspected narcotics dealers loitering inside the donut shop
25 located on the northeast corner of Golden Gate Avenue and Larkin Street.

26 Ex. 41, Amram Disco. Mtn. Decl., Att. O at Ex.04267. *See also* Ex. 1, Koeninger Disco. Mtn.
27

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1 Decl., Att. A at Ex.00643-44 (officer detailing narcotics surveillance at Civic Center Plaza
 2 focusing on “several Latin males who all appeared to know each other and pace back and forth
 3 along the sidewalk”).

4 In addition to incident-report references to Hispanic drug traffickers in the Tenderloin, it
 5 is beyond dispute that SFPD was generally aware of the presence non-Black drug traffickers in
 6 this area. Based on the CMS data described above, the FPD has identified hundreds of Superior
 7 Court cases that involve non-Black individuals who were arrested for drug-trafficking crimes in
 8 the Tenderloin between January 2013 and February 2015 (and subsequently charged in Superior
 9 Court). *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. G at Ex.02210-31. Via public records
 10 requests, the FPD also obtained numerous SFPD incident reports detailing the arrest of non-
 11 Black individuals for drug-trafficking crimes in the Tenderloin in 2013 and 2014 – a significant
 12 number of whose arrests did not result in Superior Court charges. *Cf. id.* with Ex. 1, Koeninger
 13 Disco. Mtn. Decl., Att. B. This data, obtained from criminal-justice-related entities in San
 14 Francisco, shows that the presence of non-Black drug-traffickers in the Tenderloin is anything
 15 but an anomaly.
 16

17

18 **V. Law Enforcement Interaction With, and Arrests of, Non-Black Drug Traffickers in
 19 the Tenderloin**

20 In light of the substantial evidence demonstrating the consistent and established presence
 21 of non-Black drug traffickers in the Tenderloin, it is unsurprising that SFPD arrested numerous
 22 non-Black persons for committing drug-trafficking crimes in the Tenderloin in recent years.
 23 Indeed, focusing on the time-period between January 1, 2013 and February 28, 2015, defense
 24 counsel has identified hundreds of such drug-trafficking arrests made by SFPD. First, the CMS
 25 data obtained by the FPD identifies more than 300 instances in which a non-Black individual
 26 was charged with a drug-trafficking crime in San Francisco Superior Court (along with
 27

1 corresponding arrest dates and the SFPD incident numbers underlying those criminal cases). *See*
 2 Ex. 1, Koeninger Disco. Mtn. Decl. ¶¶ 9-10 & Att. G. Second, through public records requests
 3 directed at SFPD, the defense obtained incident reports detailing more than 100 instances in
 4 which non-Black individuals were arrested for drug-trafficking crimes in the Tenderloin. *See*
 5 Ex. 1, Koeninger Disco Mtn. Decl. ¶¶ 2-4, Att. A-C. At least fifty of these incidents did not
 6 result in Superior Court charges (as reflected in the CMS data). *Compare* “Name” and “Incident
 7 Number” reflected in Ex. 1, Koeninger Disco. Mtn. Decl., Att. B *with* “Defendant Name” and
 8 “Incident Number” reflected in Ex. 1, Koeninger Disco. Mtn. Decl., Att. G.²⁸

9 As discussed in the Argument section *infra*, the defense contends that all of these non-
 10 Black, Tenderloin-based drug traffickers constitute “similarly situated” persons for purposes of
 11 the constitutional guarantee of equal protection. Nevertheless, to illustrate the disparate
 12 treatment experienced by the thirty-seven Operation Safe Schools defendants, the defense has
 13 selected approximately forty non-Black, Tenderloin-based drug traffickers for a more detailed
 14 discussion here. Many of these individuals have extensive histories of drug-trafficking in the
 15 Tenderloin (and San Francisco generally) and/or were well-known to SFPD officers in the area.
 16 Moreover, in numerous instances, the investigating SFPD officers actually made specific
 17 reference to the fact that the drug transactions at issue occurred in close proximity to a school or
 18 children’s recreation center.²⁹ *See, e.g.*, discussion of Doe-1, Doe-2, Doe-7, Doe-10, Doe-20,
 19 Doe-21, Doe-22 *infra* and in Introduction *supra*. Of course, none of these non-Black drug

20 ²⁸ There is good reason to believe that additional public records requests to SFPD would reveal
 21 additional incidents in which non-Black individuals were arrested for drug trafficking in the
 22 Tenderloin. This is because the FPD’s initial public records request was limited to those
 23 incidents identified by the SF OpenData website as involving the Tenderloin police district. Ex.
 24 1, Koeninger Disco. Mtn. Decl. ¶ 2. However, the geographic area of the Tenderloin is larger
 25 than the SFPD District. *See* Ex. 6, Sommerfeld Disco. Mtn. Decl. ¶ 3 & Att. A. The FPD’s
 26 public records request was also limited by timeframe (August-to-December 2013 and August-to-
 December 2014).

27 ²⁹ While some incident reports actually discuss a transaction’s proximity to a school, nearly
 28 every portion of the Tenderloin in which the various non-Black drug traffickers were arrested
 falls within 1,000 feet a playground or educational institution covered by 21 U.S.C. § 860. *See*
 Ex. 6, Sommerfeld Disco. Mtn. Decl. ¶ 10 & Att. D.

1 traffickers were charged federally under Operation Safe Schools.

2 A. John Doe-1

3 As detailed in the Introduction, *supra*, the December 5, 2014 arrest of [REDACTED]
4 (“John Doe-1”) was not the first time that SFPD had arrested Doe-1 for selling crack cocaine in
5 the Tenderloin. Just three months earlier, on September 10, 2014, SFPD officers arrested Doe-1
6 after observing him sell crack cocaine to at least three different people near the corner of Hyde
7 Street and Golden Gate Avenue. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00489.
8 Further, the officers who arrested Doe-1 that day “recognized [Doe-1] from a prior Base Cocaine
9 Sales arrest” from March 2013. *Id.* Indeed, after booking Doe-1 at Tenderloin Station, the
10 officers’ “further investigation showed” that Doe-1 had an outstanding warrant based on a prior
11 drug sales violation under H&S Code section 11352. *Id.*
12

13 B. John Doe-2

14 SFPD’s December 5, 2014 arrest of [REDACTED]
15 [REDACTED] (“John Doe-2”) – discussed above in the Introduction – represented
16 one of the more recent³⁰ in Doe’s lengthy history of drug-trafficking crimes in the Tenderloin.
17 When arrested in December 2014, Doe-2 had an open court case related to his May 27, 2014
18 drug-trafficking arrest at 101 Hyde Street. *Id.* at Ex.00427. On that occasion, an SFPD officer
19 engaged in a “buy bust” operation approached an “unknown latin male” (Doe-2) and purchased
20 crack cocaine from him. Ex. 41, Amram Disco. Mtn., Att. O at Ex.04243. During booking,
21 officers discovered that Doe-2 “was on active probation . . . for selling narcotics” based on a
22 2010 conviction under H&S Code section 11352. *Id.* Doe-2 was later charged under H&S Code
23

24 _____
25 ³⁰ Doe-2 was arrested again on July 3, 2015, after officers encountered him and discovered he
26 had “three active felony warrants.” *Id.* at Ex.00430.
27

1 sections 11351.5 and 11352(a). Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02529.

2 The incident underlying Doe-2's 2010 conviction also took place in the Tenderloin.
3 Specifically, on June 29, 2010, SFPD officers conducting a "buy bust" operation saw Doe-2
4 engage in a hand-to-hand narcotics transaction at 370 Turk Street. Ex. 41, Amram Disco. Mtn.
5 Att. O at Ex.04234. An undercover officer then approached Doe-2 and bought a rock of crack
6 cocaine from him. *Id.* Doe-2 was subsequently charged in Superior Court with violating H&S
7 Code section 11352(a). Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02538. The felony
8 complaint also alleged that Doe-2 committed the offense after a prior section 11352(a)
9 conviction from March 2009. *Id.*

10 The incident which lead to Doe-2's 2009 drug-trafficking conviction also occurred in the
11 Tenderloin – specifically, at 416 Turk Street on March 11, 2009. Ex. 1, Koeninger Disco. Mtn.
12 Decl., Att. F at Ex.02209.1; Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00427. Based on
13 that arrest, Doe-2 was charged with violating H&S Code section 11352(a). Ex. 2, Ultan Disco.
14 Mtn. Decl., Att. B at Ex.02550-01. Doe-2 subsequently pleaded guilty to a felony violation of
15 section 11352(a). *Id.* at Ex.02548.

16 C. John Doe-3

17 SFPD officers arrested "a white male named [REDACTED]" ("John Doe-3") in
18 November 2013 and December 2014. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00357;
19 see also *id.* at Ex.00185-00194; Ex.00349-00358. Both arrests occurred in the Tenderloin (284
20 Golden Gate Avenue and the corner of Hyde and Fulton Streets, respectively). *Id.* at Ex.00185-
21 00194; Ex.00349-00358. On both occasions, Doe-3 was found in possession of a substantial
22 amount of methamphetamine. *Id.* at Ex.00185-00194; Ex.00349-00358.

23 The first arrest occurred on November 3, 2013. *Id.* at Ex.00185. Leading up to that

1 incident, officers had received a tip that Doe-3 “was staying at the Earle Hotel” and “was selling
 2 a large amount of methamphetamine.” *Id.* at Ex.00192. The officers “knew [Doe-3] from prior
 3 methamphetamine investigations” and learned that he was on “CDC parole” for a previous
 4 conviction under section “11378 H&S (Possession for Sales of a Controlled Substance).” *Id.*
 5 Additionally, the officers learned that Doe-3 was “on felony probation out of San Francisco for
 6 11378 H&S . . . with a warrantless search and seizure condition.” *Id.* The officers traveled to
 7 284 Golden Gate Avenue, confirmed that Doe-3 was staying at the Earle Hotel, and went to his
 8 room to “conduct a probation/parole search.” *Id.* During their search, officers discovered: 263.4
 9 grams (gross) of methamphetamine; 4.3 grams (gross) of “MDMA/Ecstasy”; unknown
 10 miscellaneous pills; sandwich bags; a digital scale; two cell phones; and \$6,728. *Id.* at
 11 Ex.00187-00193. Doe-3 was booked and later charged in Superior Court with violating H&S
 12 Code sections 11366 and 11378. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02159.

13 Doe-3’s second arrest occurred approximately one year later on December 18, 2014. Ex.
 14 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00349-00358. SFPD had again received a tip that
 15 Doe-3 “was selling methamphetamine in the city and county of San Francisco,” and a records
 16 check revealed that he was “on PRCS [post release community supervision]” with a warrantless
 17 search condition “for the possession for sales of methamphetamine.” *Id.* at Ex.00357. From an
 18 address in the Bayview, undercover officers followed Doe-3 as he boarded a MUNI train and
 19 traveled to the Civic Center. *Id.* Officers then detained Doe-3 at Hyde and Fulton Streets,
 20 searched his backpack, and found: 53.3 grams (gross) of methamphetamine; plastic baggies; and
 21 a digital scale. *Id.* At that time, Doe-3 told officers that he had additional methamphetamine in a
 22 “black case” at the residence where he was staying. *Id.* After obtaining a warrant, officers went
 23 to the residence, searched the black case, and found an additional 38.5 grams (gross) of
 24 methamphetamine, packaging materials, and \$4,980. *Id.* at Ex.00357-00358. Based on this
 25 arrest, Doe-3 was again charged in Superior Court with violating H&S Code sections 11366 and
 26 11378. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02159.

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Prior to the above-described incidents, Doe-3 had previously faced drug-trafficking charges in S.F. Superior Court on at least two separate occasions: June 2012 (H&S Code section 11378) and November 2010 (H&S Code sections 11378 and 11379). *Id.*

D. John Doe-4

In 2014 alone, the SFPD arrested [REDACTED] (“John Doe-4”) on at least three occasions for trafficking crack cocaine in the Tenderloin. The most recent arrest occurred on September 12, 2014. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00300. While patrolling that day, officers saw Doe-4,³¹ and at least one officer recognized Doe-4 because he had previously arrested Doe-4 on May 19, 2014 for “11351.5 H&S – possession of cocaine base for sales.” *Id.* The officer further noted that “earlier that day,” Doe-4 had been in court for “another cocaine base sales case, case number 140141700.” *Id.* That case was based on a February 17, 2014 arrest. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02139.

Doe-4's September 2014 arrest occurred after officers observed him engaged in narcotics trafficking near the intersection of Hyde and Fulton Streets. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00300. While being detained, Doe-4 spat three plastic-wrapped bindles of crack cocaine from his mouth. *Id.* Doe-4 was subsequently booked and charged with violating section 11351.5. *Id.*; Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02139.

Doe-4 was arrested by SFPD on May 19, 2014 as well. Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00781-2. This arrest occurred in the Tenderloin at United Nations Plaza. *Id.* Suspecting that Doe-4 was selling crack cocaine, officers detained him, and Doe-4 spit twelve individually wrapped crack rocks from his mouth. *Id.* at Ex.00784. The reporting officer further noted that Doe-4 “was in court earlier today for an arrest for selling cocaine base which occurred on 2/17/14 at a nearby intersection, Hyde St and Golden Gate Ave, case 140141700.” *Id.* Doe-4 was subsequently booked and charged under section 11351.5. *Id.* at Ex.00782; Ex. 1, Koeninger

³¹ The police incident report identifies Doe-4 as Hispanic ("H").

1 Disco. Mtn. Decl., Att. F at Ex.02139.

2 Finally, Doe-4 was also charged with violating section 11351.5 based on the February 17,
 3 2014 arrest referenced above. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.002762. This arrest
 4 occurred in the Tenderloin, too (the intersection of “Hyde St and Golden Gate Ave”). Ex. 1,
 5 Koeninger Disco. Mtn. Decl., Att. D at Ex.00784; Ex.00741. After observing Doe-4 sell a
 6 woman one rock of crack, officers arrested him; they recovered ten crack rocks from Doe-4’s
 7 mouth and \$132 from his pocket. *Id.* at Ex.00741. The officers also detained the woman who
 8 purchased crack from Doe-4. *Id.* at Ex.00746. She described Doe-4 as the ““Honduran male
 9 wearing a base ball [sic] hat”” who ““looks like Bruno Mars””; the woman stated that she buys
 10 ““from Bruno Mars all the time.”” *Id.*

11 E. Jane Doe-5

12 On August 15, 2014, SFPD officers received a tip from a “citizen informant” stating that
 13 “there is narcotics activity coming from 120 Hyde Street #16 in the City and County of San
 14 Francisco.” Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00659. The resident of that
 15 address was [REDACTED] (“Jane Doe-5”),³² and her identity was confirmed by the informant. *Id.*
 16

17 SFPD officers learned that Doe-5’s “rap sheet indicated prior methamphetamine related
 18 arrests and convictions,” both for trafficking (H&S Code section 11378) and for simple
 19 possession (H&S Code section 11377(a)). *Id.* Doe-5 also was “on felony probation” based on a
 20 section 11378 conviction, and the officers called her probation officer to confirm her probationer
 21 status and her residence at 120 Hyde Street. *Id.* SFPD then traveled to Doe-5’s residence and
 22 knocked on her door. *Id.* In response to the officers’ inquiries, Doe-5 admitted to having “an
 23 eight ball on [her] bed.” *Id.* A subsequent search of Doe-5’s person and apartment yielded the
 24 following: seven press-lock baggies of methamphetamine totaling 31.4 grams (gross); a
 25 prescription bottle (in another person’s name) containing twenty suspected oxycodone pills; a

26 ³² The relevant SFPD incident report identifies Doe-5 as White (“W”).

1 digital scale; packaging materials (ninety-three smaller press-lock baggies); and \$893. *Id.* at
 2 Ex.00659-00660. Doe-5 was arrested and transported to Tenderloin Station for booking. *Id.* at
 3 Ex.00659.

4 As a result of the foregoing, Doe-5 was charged in Superior Court with violating, *inter*
 5 *alia*, H&S Code section 11378. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02141. This
 6 was not the first occasion on which Doe-5 faced drug-trafficking charges in San Francisco. In
 7 both September 2011 and December 2005, Doe-5 was charged in S.F. Superior Court with
 8 violating H&S Code sections 11351 and 11378. *Id.*

9 F. John Doe-6

10 When SFPD officers arrested [REDACTED] (“John Doe-6”) on November 19, 2013 for
 11 selling crack cocaine near the intersection of Hyde and Grove Streets, it represented Doe-6’s
 12 third arrest in less than four months for dealing crack in the Tenderloin. Ex. 1, Koeninger Disco.
 13 Mtn. Decl., Att. A at Ex.00229. The other two arrests occurred on August 1, 2013 (O’Farrell and
 14 Larkin Streets) and July 27, 2013 (Polk and Olive Streets), and both resulted in state court
 15 charges. *Cf. id.* (identifying court case numbers) *with* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F
 16 at Ex.02174 (listing court case numbers, dates of arrest, and location of arrest).

17 In the moments leading up to Doe-6’s November 2013 arrest, an officer surveilling the
 18 area of Hyde and Grove saw Doe-6 and recognized him “from prior police contacts, which
 19 include arrests for sales of base cocaine, and possession of base cocaine for sale” (the August
 20 2013 and July 2013 arrests). *Id.* “[F]rom these two prior arrests,” the officer knew that Doe-6
 21 “dealt off white rocks of base cocaine from his mouth.” *Id.* The officer then saw Doe-6 engage
 22 in a suspected drug transaction with another male by bringing “his right hand to his mouth and
 23 spit[ting] out an unknown object.” *Id.* When approached by the SFPD “arrest team,” Doe-6 had
 24 “numerous individually wrapped off white rocks” of crack in his mouth which he then spit to the
 25 ground. *Id.* In total, Doe-6 spat forty-one individually wrapped rocks of crack cocaine from his
 26 mouth. *Id.* at Ex.00229-00230. Officers also found a baggie of marijuana and \$29 in Doe-6’s
 27

1 front pant pocket. *Id.* at Ex.00229.

2 SFPD booked Doe-6 at Tenderloin Station where a records check revealed that he was on
3 felony probation and also had a no bail felony warrant for his arrest. *Id.*

4 G. Jane Doe-7

5 On October 15, 2013, SFPD conducted a surveillance operation in the Tenderloin near
6 Turk and Taylor Streets. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00051. There, an
7 officer saw [REDACTED] (“Jane Doe-7”), “a Hawaiian female” who he knew “from numerous
8 prior contacts.” *Id.* at Ex.00054. The officer watched as Doe-7 made a suspected drug
9 transaction near 144 Taylor Street. *Id.* at Ex.00054-00055. Officers then arrested the buyer, who
10 dropped a rock of crack cocaine to the sidewalk when they approached. *Id.* at Ex.00054. When
11 Doe-7 was subsequently arrested, officers found her \$371 “crumpled in her purse.” *Id.* at
12 Ex.00055. Doe-7 was booked at Tenderloin station. *Id.* The officers who arrested Doe-7 noted
13 that the location at which she sold crack “was within 1000 yards” of “the San Francisco City
14 Academy,” a school located at 230 Jones Street. *Id.* One officer measured the distance between
15 the school and the site of Doe-7’s drug transaction: “approximately 737 feet.” *Id.*

16 At the time of her October 2013 arrest, Doe-7 was on felony probation for a prior
17 conviction under H&S Code section 11352(a), and she was known to “frequent[] the Tenderloin
18 District.” *Id.* at Ex.00055. The conviction for which Doe-7 was on probation (court number
19 12017792) was based on an arrest made in the Tenderloin, too (at 132 Eddy Street). Ex. 1,
20 Koeninger Disco. Mtn. Decl., Att. F at Ex.02199. Additionally, Doe-7 had at least two other
21 prior drug-trafficking arrests in the Tenderloin: first, a December 2010 arrest at 64 Turk Street
22 which lead to a charge under H&S Code section 11352(a); second, a May 2012 arrest at 29
23 Mason Street which lead to a charge under H&S Code section 11351.5. *See id.*

24 H. John Doe-8

25 [REDACTED] (“John Doe-8”) was arrested on December 26, 2013 for narcotics

1 trafficking near 353 Turk Street. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00249.
 2 According to the relevant incident report, Doe-8 is White (“W”). *Id.* at Ex.00244. When he was
 3 subsequently charged in Superior Court for various drug-trafficking violations, it represented at
 4 least the fifth time that drug-trafficking charges were filed against Doe-8 in San Francisco. *See*
 5 Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02181 (detailing cases in March 2013, July
 6 2011, February 2011, and June 2008). In at least two of his previous cases, Doe-8 was arrested
 7 in the Tenderloin. *See id.*

8 Doe-8’s December 2013 arrest occurred after SFPD officers observed him engage in a
 9 suspected narcotics transaction with another White male. Ex. 1, Koeninger Disco. Mtn. Decl.,
 10 Att. A at Ex.00249. When the officers approached Doe-8 to investigate, they saw money and
 11 two pieces of heroin in his open hand. *Id.* After detaining Doe-8, officers ran a records check
 12 and learned that he was “on active felony probation with a search condition.” *Id.* During a
 13 search of Doe-8’s person, the officers found: 110 pills of oxycodone; twenty-two pills of
 14 buprenorphine/naloxone; twenty-nine pills of clonazepam; one alprazolam pill; five morphine
 15 pills; and \$117. *Id.* at Ex.00247-00249.

16 I. John Doe-9

17 In early September 2013, the SFPD received information that [REDACTED]
 18 (“John Doe-9”) was selling methamphetamine from his apartment on O’Farrell Street in the
 19 Tenderloin (near the intersection of Jones Street). Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
 20 Ex.00077. Using a telephone number provided by an informant, an undercover officer contacted
 21 Doe-9 on September 9 seeking to buy methamphetamine. *Id.* Doe-9 said he “was out of Ice but
 22 had ‘Molly,’” which “is a mixture of methamphetamine and ecstasy.” *Id.* The officer later met
 23 Doe-9 in a laundromat at 517 O’Farrell Street where he purchased “four quarters” of Molly from
 24 Doe-9 (1.8 grams gross). *Id.* According to the SFPD incident report, Doe-9 is a White (“W”)
 25 male. *Id* at 00075.

26 Eleven days later, the same officer contacted Doe-9 and asked to buy “Ice” or “Molly.”
 27

1 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00019. Prior to the call, the officer had already
 2 obtained a search warrant to search Doe-9's apartment. *Id.* Doe-9 said he only had ecstasy and
 3 marijuana, but would try to locate some methamphetamine. *Id.* When he next spoke with the
 4 officer, Doe-9 explained that he could not find any methamphetamine, but he agreed to sell
 5 another "quarter of 'Molly'" to the officer at the same laundromat. *Id.* Doe-9 was arrested after
 6 he arrived at the laundromat and sold the officer ecstasy. *Id.* During execution of the search
 7 warrant at Doe-9's apartment, SFPD recovered nineteen baggies of marijuana and a digital scale.
 8 *Id.* at Ex.00019-00020.

9 Doe-9 was booked at Northern Station where officers learned that he "had two
 10 outstanding warrants." Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00020. Doe-9 was
 11 subsequently charged in Superior Court with violating H&S Code section 11359. Ex. 1,
 12 Koeninger Disco. Mtn. Decl., Att. F at Ex.02201. According to the CMS data obtained by the
 13 FPD, Doe-9 was previously charged with drug-trafficking crimes in (at least) January 2010,
 14 August 2009, and November 2008. *See id.*

15 J. John Doe-10

16 During 2013, the SFPD arrested [REDACTED] (John Doe-10) at least
 17 three times for trafficking crack cocaine in the Tenderloin – including an arrest for selling within
 18 1,000 feet of a school on November 18, 2013. On that occasion, officers were engaged in a
 19 "spotting operation" near the corner of Hyde Street and Golden Gate Avenue. Ex. 1, Koeninger
 20 Disco. Mtn. Decl., Att. C at Ex.00676. There, an officer saw Doe-10,³³ "a subject that [he had]
 21 made contact with in the past." *Id.* at Ex.00676. The officer watched as Doe-10 engaged in a
 22 narcotics transaction with a woman by spitting a "white object" from his mouth, showing it to
 23 the woman, and exchanging it for cash. *See id.* The woman was later arrested with one crack
 24 rock in her possession. *See id.* Officers then arrested Doe-10 and found \$582 on his person. *Id.*
 25

26 ³³ The relevant incident report identifies Doe-10 as Hispanic ("H"). *Id.* at Ex.00674.

1 The officers also noted that the observed drug transaction took place within 1,000 feet of the
 2 “DeMarillac Academy located at 175 Golden Gate Ave.” *Id.* While Doe-10 was being booked
 3 at Tenderloin Station, the officers learned that he had “an open case” and a stay-away order from
 4 the area in which they arrested him. *Id.* The open case was based on Doe-10’s arrest on August
 5 22, 2013. *Cf. id.* (listing court case number for “open case”) with Ex. 1, Koeninger Disco. Mtn.
 6 Decl., Att. F at Ex.02186 (listing same court case number, “8/22/2013” arrest date, and SFPD
 7 incident number). Based on his November 2013 arrest, Doe-10 was charged in Superior Court
 8 with selling and offering to sell crack cocaine in violation of H&S Code section 11352(a). Ex. 2,
 9 Ultan Disco. Mtn. Decl., Att. B at Ex.02465. Moreover, the complaint alleged that Doe-10
 10 committed the his offense within 1,000 feet of a “public or private elementary, vocational, junior
 11 high, or high school, to wit: DEMARILLAC ACADEMY.” *Id.* at Ex.02466.

12 As noted above, Doe-10’s August 22, 2013 arrest also led to Superior Court charges, and
 13 it likewise was the result of crack cocaine sales in the Tenderloin (in particular, the corner of
 14 Eddy and Hyde Streets). Ex. 1 Koeninger Disco. Mtn. Decl., Att. A at Ex.00528-00531.
 15 Specifically, Doe-10 sold two crack rocks directly to an undercover officer. *Id.* at Ex.00531.
 16 When SFPD arrested Doe-10, officers recovered four more crack rocks from his mouth and \$93
 17 from his person. *Id.* Following this August 2013 arrest, Doe-10 was charged in a three-count
 18 felony complaint with violating H&S Code section 11351.5 and 11352. Two counts in the
 19 complaint were based on the events described above, but one count was predicated on yet
 20 another arrest that occurred eight months earlier on January 29, 2013. Ex. 2, Ultan Disco. Mtn.
 21 Decl., Att. B at Ex.02512-13.

22 Doe-10’s January 2013 arrest also occurred at the corner of Eddy and Hyde Streets,
 23 where officers saw him speaking with two other individuals. Ex. 1, Koeninger Disco. Mtn.
 24 Decl., Att. D at Ex.00728. After Doe-10 “spit numerous objects into his hand,” officers
 25 suspected that they “were witnessing a narcotics transaction.” *Id.* They detained Doe-10 and the
 26 two other persons, one of whom admitted to buying six crack rocks from Doe-10. *Id.* Doe-10
 27

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1 had \$316 in his possession. *Id.* The officers transported Doe-10 to Tenderloin Station and
 2 booked him under H&S Code section 11352(a).

3 Finally, Doe-10 was most recently arrested on April 29, 2015 for trafficking crack
 4 cocaine at 255 Hyde Street in the Tenderloin. Doe-10 was again charged in Superior Court with,
 5 *inter alia*, possession of crack cocaine for sale in violation of H&S Code section 11351.5. Ex. 2,
 6 Ultan Discovery Decl., Att. B at Ex.02424. He also was charged with loitering while carrying a
 7 concealed weapon (a knife) in violation of Penal Code section 1291(b). *Id.*

8 K. John Doe-11

9 On October 23, 2013, three plainclothes SFPD officers were driving southbound on Hyde
 10 Street near its intersection with Eddy Street. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
 11 Ex.00506. From their patrol car, one of the officers saw “a Latin male” who he recognized as
 12 [REDACTED] (“John Doe-11”). *Id.* According to the officer, Doe-11 “frequents the 200 block of
 13 Hyde Street” and was “known to numerous Tenderloin Officers [sic].” *Id.* The officer reported
 14 that he saw Doe-11 “on Hyde Street almost every day that I work.” *Id.* The officer also knew
 15 that Doe-11 had been arrested at 255 Hyde Street less than three weeks earlier for resisting
 16 arrest, and was arrested on July 16, 2013 for selling crack cocaine to an undercover officer at 232
 17 Hyde Street. *Id.* Doe-11 also was arrested on June 2, 2011 for trafficking crack cocaine near
 18 496 Eddy Street. *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02152.
 19

20 From his patrol car, the officer watched as Doe-11 engaged in a “a hand-to-hand
 21 narcotics transaction” with a Black male. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
 22 Ex.00506. The officers stopped their car, and Doe-11 fled when he saw them. *Id.* The buyer
 23 dropped three individually wrapped crack rocks to the sidewalk as the officers approached and
 24 was subsequently arrested. *Id.* The officers eventually caught up to Doe-11, who was arrested.
 25 Doe-11 was booked at Tenderloin Station and eventually charged in Superior Court with
 26 violating H&S Code section 11352(a). *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at
 27 Ex.02152.
 28

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1 Doe-11 was previously charged with drug-trafficking violations in June 2011 based on an
2 arrest at 496 Eddy Street. *Id.*

3 L. John Doe-12

4 On November 26, 2014, SFPD Officers responded to Hyde and Fulton Streets “on a call
5 of a group of Hispanic males selling drugs.” Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
6 Ex.00148. Officers encountered [REDACTED] (“John Doe-12”), and while detaining him,
7 Doe-12 spat out “twenty four plastic twists” containing crack cocaine. Doe-12 was booked for
8 violating H&S Code section 11351.5 and identified at the station by his fingerprint. *Id.* The
9 SFPD incident report identifies Doe-12’s race as Hispanic (“H”).
10

11 According to the Superior Court file, Doe-12’s November 2014 arrest resulted in felony
12 complaint alleging a violation of section 11351.5. Ex. 2, Ultan Discovery Decl., Att. B at
13 Ex.02811. Doe-12 apparently was also arrested on July 12, 2014 for trafficking crack cocaine,
14 because the felony complaint separately alleges a section 11352(a) violation on that date. *Id.*

15 San Francisco Superior Court records also show that Doe-12 was convicted in February
16 2009 for violating H&S Code section 11351.5. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at
17 Ex.02772. As a result of that conviction, Doe-12 was ordered to stay away from the intersection
18 of Eddy and Hyde streets. *Id.* at Ex.02773.
19

20 Finally, Doe-12 was again arrested for drug-trafficking in the Tenderloin (Hyde and
21 Fulton) on January 29, 2015. *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02175
22 (indicating section 11352(a) charge).
23

M. John Doe-13

24 On both October 23, 2014 and November 12, 2014, SFPD officers arrested [REDACTED]
25 [REDACTED] (“John Doe-13”)³⁴ for selling crack cocaine near the intersection of Hyde Street and
26

27
28 ³⁴ The S.F. Superior Court documents spell [REDACTED] name both as [REDACTED] and [REDACTED].

1 Golden Gate Avenue. During the October 23 incident, officers were engaged in a “spotting
 2 operation” when they “observed a Hispanic male” (Doe-13) engage in a hand-to-hand drug
 3 transaction with another person. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00137. When
 4 Doe-13 was subsequently arrested, officers recovered forty-four individually wrapped crack
 5 rocks from Doe-13’s mouth. *Id.* Doe-13 was charged in Superior Court with violating H&S
 6 Code sections 11351.5 and 11352.

7 While the above case was pending, Doe-13 again was arrested by SFPD for trafficking
 8 crack cocaine at the corner of Hyde Street and Golden Gate Avenue. Ex. 1, Koeninger Disco.
 9 Mtn. Decl., Att. A at Ex.00106. In particular, officers patrolling the area on November 12
 10 observed Doe-13 offering to sell crack cocaine to woman in front of the U.S. post office at 101
 11 Hyde Street. *Id.* When they detained Doe-13, the officers seized five plastic-wrapped bindles of
 12 crack from his hand. *Id.* Doe-13 was again charged in Superior Court with violating H&S Code
 13 section 11351.5. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02269-02270; Ex. 1, Koeninger
 14 Disco. Mtn. Decl., Att. F at Ex.02165. He also was charged with violating a stay-away order
 15 imposed after his October arrest. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02269-02270.

16 N. John Doe-14

17 Between August 2014 and November 2014, SFPD officers arrested [REDACTED]
 18 (“John Doe-14”) at least three times – all for narcotics trafficking near the corner of Larkin and
 19 O’Farrell Streets. *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02160. Doe-14 had two
 20 additional drug-trafficking arrests at the same corner in March and April 2015. *See id.* All five
 21 arrests led to charges in Superior Court. *Id.*

22 Defense counsel has not yet obtained the incident reports underlying Doe-14’s November
 23 2014, March 2015 and April 2015 drug-trafficking arrests. On October 2, 2014, however, Doe-
 24 14 was arrested during a narcotics “spotting operation.” Ex. 1, Koeninger Disco. Mtn. Decl.,
 25 Att. A at Ex.00326. Officers saw “a Hispanic male” (Doe-14) engage in a hand-to-hand
 26 narcotics transaction with a “Black male”; when officers detained the buyer (the “Black male”),
 27

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1 they found a rock of crack cocaine in his possession. *Id.* Doe-14 was later arrested with \$92 and
 2 booked at Tenderloin station under H&S section 11352(a). *Id.* at Ex.00323

3 Two months earlier, SFPD had arrested Doe-14 at the same corner when an undercover
 4 officer purchased a rock of crack cocaine directly from Doe-14. Ex. 1, Koeninger Disco. Mtn.
 5 Decl., Att. A at Ex.00290. Officers found \$351 in his possession and booked him Tenderloin
 6 Station under H&S Code section 11352(a). *Id.* at Ex.00289.

7 O. John Doe-15

8 The SFPD began investigating [REDACTED] (“John Doe-15”) in October 2013 after an
 9 informant told officers that Doe-15 was “selling large amounts of methamphetamine throughout
 10 the City and is living at the Winton Hotel at 445 O’Farrell.” Ex. 1, Koeninger Disco. Mtn. Decl.,
 11 Att. A at Ex.00048.³⁵ SFPD officers knew Doe-15 “from prior narcotics investigations as a
 12 known methamphetamine trafficker” and also knew that he was “currently on felony probation
 13 with a warrantless search condition.” *Id.* at Ex.00048.

14 On October 18, 2013, officers followed Doe-15 to the fourth floor of the Winton Hotel
 15 and detained him in the hallway outside his room. *Id.* Officers found \$2,146 on Doe-15’s
 16 person. *Id.* at Ex.00045-00048. During a search of Doe-15’s room, the officer encountered Doe-
 17 15’s roommate, who said that Doe-15 had lived there with him for about a year, “except for the
 18 time that [Doe-15] was incarcerated earlier [that] year.” *Id.* at Ex.00048. During a probation
 19 search of Doe-15’s “area of the apartment,” officers found 12.6 grams (gross) of
 20 methamphetamine on a shelf along with a digital scale and sandwich baggies. *Id.* at Ex.00048-
 21 00049. Inside a safe in the same area, officers found fourteen “individually packaged large
 22 amounts” of methamphetamine – weighing 405.5 grams (gross) – and an additional \$2,800. *Id.*
 23 at Ex.00045-00048.

24 Based on the October 2013 arrest, Rivas was charged in S.F. Superior Court with
 25

26 ³⁵ The relevant SFPD incident report identifies Doe-15 as White (“W”). *Id.* at Ex.00044.

1 violating H&S Code section 11378. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02187.
 2 Rivas had previously been arrested on at least three other occasions for violating section 11378
 3 (November 2009, March 2009, and April 2007), each of which resulted in state charges. *Id.*

4 P. John Doe-16

5 In October 2014, SFPD received [REDACTED] (“John Doe-16”)’s phone number from an
 6 informant in relation to a narcotics-trafficking investigation. Ex. 1, Koeninger Disco. Mtn.
 7 Decl., Att. A at Ex.00342. SFPD described Doe-16³⁶ as “a notorious methamphetamine
 8 trafficker” who is “currently on felony probation with a warrantless search condition out [of] San
 9 Mateo County for [a] narcotics offense” (a violation of H&S Code section 11378). *Id.* at
 10 Ex.00380. On December 3, 2014, an undercover officer telephoned Doe-16 and arranged to buy
 11 an “8Ball” of methamphetamine from him; Doe-16 said he was currently in the area of Turk and
 12 Taylor Streets and would meet the officer in the area of Jones Street and Golden Gate Avenue.
 13 *Id.* at Ex.00342. Doe-16 and the officers rendezvoused at 55 Golden Gate, and Doe-16 sold the
 14 officer 4 grams (gross) of methamphetamine. *Id.* The officer then drove away. *Id.*
 15

16 About four weeks later, on December 30, the officer again called Doe-16 and arranged to
 17 buy “two 8balls” of methamphetamine near 50 Golden Gate Avenue. Ex. 1, Koeninger Disco.
 18 Mtn. Decl., Att. A at Ex.00380. Doe-16 arrived with the methamphetamine and was arrested.
 19 *Id.* Upon searching Doe-16 and the contents of his car, officers found (in addition to the meth)
 20 marijuana and a meth pipe. *Id.* Doe-16 was taken to Tenderloin Station while some officers
 21 traveled to his Oakland residence to conduct a probation search. *Id.* at Ex.00381. There, they
 22 found marijuana, liquid GHB, a digital scale, numerous ziplock baggies and envelopes. *Id.*

23 Doe-16 was subsequently charged in Superior Court based on the foregoing events. See
 24 Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02207. This was not the first time Doe-16
 25 faced drug-trafficking charges in San Francisco. In January 2010, Doe-16 was also charged with

26 ³⁶ The incident report identifies Doe-16 as White (“W”). Ex.00341.

1 violating H&S Code sections 11359, 11366, 11377, 11378, and 11379. *See id.*

2 Q. John Doe-17

3 As they conducted a narcotics surveillance operation at Larkin and O'Farrell Streets on
 4 September 1, 2014, SFPD officers saw [REDACTED] ("John Doe-17") standing on the corner.
 5 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00450. Doe-17, identified as Hispanic ("H"),
 6 *id.*, was well-known to the officers. One officer "recognized [Doe-17] from a prior base cocaine
 7 sale arrest that occurred in the [same] area." *Id.* A surveilling officer saw "[Doe-17] sell base
 8 cocaine." *Id.* Another officer involved in the operation added:
 9

10 [Doe-17] was also arrested during another surveillance operation in this area on
 11 09-05-2013 for selling base cocaine In addition to his two prior arrests in
 12 this area, myself, and the other plain clothes officers I work with, observe [Doe-
 13 17] loitering in the area of O'[F]arrell Street and Larkin Street on a daily basis. I
 14 observe [Doe-17] in this area when I am on patrol and when I conduct
 15 surveillance in the area of Larkin and O'[F]arrell Street. On many occasions,
 16 [Doe-17] appears to take the role of a supervisor in this area, directing 'buyers' to
 17 other 'sellers.' I have observed [Doe-17] conduct suspected hand to hand
 18 narcotics transactions in this area.

19 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00450.

20 SFPD officers watched Doe-17 for about an hour on September 1, during which time he
 21 engaged in a drug transaction. *Id.* Officers arrested the buyer at another location and found him
 22 in possession of a glass pipe with "rocks/crumbs" of crack cocaine "stuffed in one end." *Id.*
 23 Officers arrested Doe-17 and booked him at Tenderloin Station. *Id.* at Ex.00450-00451.

24 R. John Doe-18

25 On June 11, 2014, SFPD officers were conducting a "buy bust" operation in the
 26 Tenderloin. Ex. 41, Amram Disco. Mtn. Decl., Att. O at Ex.04248-54. While walking on Hyde
 27 Street near Fulton, an officer "observed (3) Latino males engaging in numerous hand to hand
 28 narcotic sales of suspected cocaine base." *Id.* [REDACTED] ("John Doe-18") was one of
 the three "Latino males" and appeared to be "managing the drug sales between the three of

1 them.” *Id.* After an undercover officer purchased drugs from one of the “Latino males,” all
 2 three were arrested. During his arrest, Doe-18 spit 16 rocks of crack cocaine from his mouth. *Id.*
 3 Doe-18 was booked under Cal. H&S Code sections 11351.5 and/or 11352. *Id.*

4 In addition to the June 11 arrest, the SFPD arrested Doe-18 on at least two other
 5 occasions in 2014 for drug-trafficking in the Tenderloin. *See Ex. 1, Koeninger Disco. Mtn.*
 6 Decl., Att. F at Ex.02203. First, Doe-18 was arrested near Hyde Street and Golden Gate Avenue
 7 on March 11, 2014 for violating H&S Code section 11352(a). *Id.* He also was arrested April 3,
 8 2014 at 330 Golden Gate Avenue for violating H&S Code section 11351.5. *Id.*

9 S. John Doe-19

10 While conducting a “Buy Bust” operation on September 9, 2013, an undercover SFPD
 11 officer working at the corner of Hyde Street and Golden Gate Avenue purchased three rocks of
 12 crack cocaine from “a Latin male” named [REDACTED] (“John Doe-
 13 19”). *Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00571-73.* According to SFPD, Doe-19
 14 “has had numerous prior narcotics related arrests,” and he also “had an 11352(a) H&S
 15 conviction” from April 2009 in San Francisco Superior Court. *Id.* at Ex.00574. In that case,
 16 Doe-19 was charged under the name [REDACTED]. *Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at*
 17 *Ex.02200* (listing same case number with March 2009 arrest date). In addition to the April 2009
 18 conviction, [REDACTED] was charged in December 2009 with one count of violating H&S Code
 19 section 11352(a) based on an arrest at 537 Hyde Street in San Francisco. *Id.*

20 T. John Doe-20

21 On October 31, 2013, SFPD “organized a ‘Buy Bust’ operation in the Tenderloin
 22 District.” *Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00519.* “[S]everal children in
 23 Halloween costumes … appeared to be ‘trick or treating’” nearby while officers in plainclothes
 24 surveilled the corner of Hyde Street and Golden Gate Avenue. *Id.* at Ex.00520. Near that
 25 corner, officers saw “a Latin male,” [REDACTED] (“John Doe-20”). *Id.* at Ex.00519. At least
 26

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1 one of the officers “recognized [Doe-20] from a prior surveillance operation” during which the
 2 officer “observed [Doe-20] engage in several suspected hand to hand narcotics deals in this same
 3 area.” *Id.* at Ex.00520.

4 An undercover officer approached Doe-20 and purchased one rock of crack cocaine from
 5 him. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00520. Afterwards, other officers
 6 arrested Doe-20 and seized \$112 from his person. *Id.* at Ex.00519-00520. Later, the officers
 7 measured the distance between the location where Doe-20 sold the crack rock and “175 Golden
 8 Gate Avenue, the DeMarillac Academy” (a nearby school). *Id.* at Ex.00519. Because the
 9 distance was “approximately 715.1 feet,” Doe-20 was “in violation of 11353.6(b) H&S” as well
 10 as H&S Code section 11352(a). *Id.* at Ex.00517-00519. Doe-20 was later charged in S.F.
 11 Superior Court under both statutes. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02134.

12 U. John Doe-21

13 While conducting a “Buy Bust Operation” in the Tenderloin on October 22, 2013, an
 14 SFPD officer purchased one rock of crack cocaine from “a Hispanic male” at the corner of
 15 Larkin and O’Farrell Streets. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00500. They
 16 then arrested the seller, [REDACTED] (“John Doe-21”), and found \$401 on his person.
 17 *Id.* The officers also noted that the place at which the narcotics transaction took place was “971
 18 feet in distance” from the “Tenderloin Recreation Center” located at 570 Ellis Street. *Id.*
 19 Accordingly, Doe-21 was booked at Tenderloin station for violating H&S Code sections
 20 11352(a) and 11353.6(b). *Id.* at Ex.00498.

21 V. John Doe-22

22 On September 16, 2014, SFPD officers arrested [REDACTED] (“John Doe-22”), a
 23 “Hispanic male,” at the corner of Hyde Street and Golden Gate Avenue after he sold crack
 24 cocaine to an undercover officer. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00310.
 25 According to the incident report:

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1 The DeMarillac Academy is a half a block away from where all these narcotics
 2 transactions are taking place [at Hyde and Golden Gate]. The Academy is a
 3 school for students ranging from Kindergarten to 8th grade. The narcotics dealers
 4 in this area have the audacity to continue their open air narcotics deals while
 5 students are being walked to and from school.

6 *Id.* The location at which Doe-22 sold crack to the undercover officer was “720 feet” from the
 7 “front gate of DeMarillac Academy.” *Id.* Doe-22 was booked at Tenderloin Station under H&S
 8 Code section 11352(a), and a “charge of selling narcotics within 1000 feet of a school.” *Id.*

9 Doe-22’s September 2014 was not his first drug-trafficking charge from the Tenderloin.
 10 See Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02144. He also was charged in February
 11 2010 for drug sales, and that case arose from an arrest in the Tenderloin at Geary and Hyde
 12 Streets. *Id.*

13 W. John Doe-23

14 On November 2, 2014, SFPD officers were conducting a “spotting operation” in the
 15 Tenderloin at Larkin and O’Farrell Streets, an area “well known to officers due to the abundant
 16 levels of narcotics activity that take place” there. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
 17 Ex.00163. Officers “observed a Latin male later identified as [REDACTED] (“John Doe-23”). *Id.*
 18 One officer “immediately recognized [Doe-23] as a subject that we have arrested in the past for
 19 narcotics sales” and “noted that [Doe-23] currently ha[d] an open case pending as well as a stay
 20 away order from the area of Larkin and O’Farrell St.” *Id.* After observing Doe-23 engage in
 21 what they believed was a “street level hand to hand narcotics transaction,” the officer detained
 22 the buyer and recovered one rock of crack cocaine from his person. *Id.* The officers then
 23 arrested Doe-23, on whose person they found \$278. *Id.*

24 The “open pending case” and “stay away order” referenced above was based on Doe-23’s
 25 February 11, 2014 arrest by the same SFPD officers at the same location (Larkin and O’Farrell).
 26 Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00704-09. On that occasion, the officers saw
 27 Doe-23 engage in a hand-to-hand drug transaction; when they arrested him moments later, the

1 officers seized eleven individually wrapped rocks of crack cocaine from Doe-23's left hand. *Id.*
 2 at Ex.00709. Doe-23 was later charged in Superior Court with violating H&S Code sections
 3 11351.5 and 11352(a). Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02135.

4 X. John Doe-24

5 On November 4, 2014, while conducting a "Buy Bust" operation "at the intersection of
 6 Hyde Street and Golden Gate Avenue," an SFPD officer using binoculars "observed a Latin male
 7 who [he] recognized from a prior arrest." Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
 8 Ex.00183. The "Latin male" was ██████████ ("John Doe-24"). The officer noted that Doe-
 9 24 had "an open matter" in Superior Court for another drug-trafficking arrest in "the area of
 10 Hyde Street and Golden Gate Avenue." *Id.*

11 The officer saw Doe-24 standing near the entrance to the U.S. post office, where he was
 12 approached by a man who gave Doe-24 money in exchange for crack cocaine (a "small off-white
 13 object" that Doe-24 spat from his mouth). *Id.* The buyer was arrested and officers seized a crack
 14 rock and glass pipe from his person. *Id.* at Ex.00183-00184. Doe-24 was later charged in
 15 Superior Court for violating H&S Code section 11352(a). *See* Ex. 1, Koeninger Disco. Mtn.
 16 Decl., Att. F at Ex.02145. It was the third time Doe-24 faced drug-trafficking charges in 2014
 17 alone. *See id.* (identifying October 2014 and February 2014 cases charging section 11352(a)
 18 violations).

19 Y. John Doe-25

20 SFPD officers arrested ██████████ ("John Doe-25") on September 13, 2013 while
 21 conducting a narcotics surveillance operation at the area of Hyde and Eddy Streets. While
 22 watching the 200 block of Hyde, one officer saw Doe-25, who he knew "from prior contacts."
 23 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00580. Doe-25 was approached by a female
 24 who gave him money in exchange for an object that Doe-25 retrieved from his mouth. *Id.*
 25 Believing that Doe-25 had just engaged in "a street level hand to hand narcotics transaction," the
 26

1 officers arrested the buyer and recovered two individually wrapped crack rocks and a glass pipe.
 2 *Id.* Doe-25 was arrested, too, and the officers found “numerous amounts” of “rolled and
 3 crumpled” currency in his possession totaling \$228. *Id.*

4 Doe-25 was booked at Tenderloin Station where a records check “revealed that he [was]
 5 currently on felony probation with a warrantless search condition for 11352(a).” *Id.* According
 6 to CMS, Doe-25 also was charged with drug-trafficking crimes in August and September 2011.
 7 Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02156.

8 Z. John Doe-26
 9

10 During a three-week period in 2013, SFPD officers twice arrested [REDACTED] (“John
 11 Doe-26”) for selling crack cocaine along Hyde Street in the Tenderloin. Ex. 1, Koeninger Disco.
 12 Mtn. Decl., Att. A at Ex.00558-00564; Ex.00565-00569. The first arrest occurred on August 11,
 13 2013, after officers observed “a Hispanic male” (Doe-26) spit crack cocaine from his mouth and
 14 sell it to another man at the corner of Eddy and Hyde Streets. *Id.* at 00561. The officers arrested
 15 the buyer and found three crack rocks and a glass pipe on his person. *Id.* The buyer said that he
 16 bought the crack from Doe-26. *See Id.* When the officers arrested Doe-26 and searched his
 17 person, they found “two wads of currency” totaling \$683. Doe-26 was booked at Tenderloin
 18 Station and later charged with violating H&S Code section 11352. *Id.* at Ex.00561-00564; Ex. 1,
 19 Koeninger Disco. Mtn. Decl., Att. F at Ex.02142.

20 The SFPD again arrested Doe-26 for selling crack on September 4, 2013. Ex. 1,
 21 Koeninger Disco. Mtn. Decl., Att. A at Ex.00565-00569. On that date, an undercover officer
 22 purchased two crack rocks from “a Hispanic male” (Doe-26) at 245 Hyde Street. *Id.* Ex.00568.
 23 Doe-26 was arrested with \$206 in his possession (including \$40 in police-marked funds) and
 24 booked. *Id.* Ex.00569. Doe-26 was again charged with violating H&S Code section 11352. Ex.
 25 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02142. Approximately two months later, while
 26 trying to locate Doe-26, SFPD officers found him “in custody with the Alameda County
 27 Sheriff’s Department (ACSD) on an unrelated matter.” Ex. 1, Koeninger Disco. Mtn. Decl., Att.
 28

1 A at Ex.00564.

2 AA. John Doe-27

3 During the autumn of 2013, the SFPD twice arrested [REDACTED] (“John Doe-27”) for
 4 selling crack cocaine in the Tenderloin. First, on October 25, Doe-27 was observed in near
 5 Larkin and O’Farrell Streets attempting to avoid detection by the officers, manipulating objects
 6 in his mouth, and eventually fleeing. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00510.
 7 Believing that Doe-27 was attempting to destroy contraband, the officers detained him, and Doe-
 8 27 subsequently spit fourteen crack rocks from his mouth. *Id.* Doe-27 was booked under H&S
 9 Code sections 11351.5 and 11352. *Id.* The police incident report identifies him as Hispanic
 10 (“H”).

11 On November 13, 2013 (approximately two weeks later), SFPD officers again arrested
 12 Doe-27 for trafficking crack cocaine, this time near the corner of Hyde and Turk Streets. Ex. 1,
 13 Koeninger Disco. Mtn. Decl., Att. A at Ex.00205. On that occasion, Doe-27 sold one crack rock
 14 to an undercover officer, and additional rocks were recovered after Doe-27 was arrested. *Id.*
 15 Following this second arrest, Doe-27 was charged in Superior Court with two counts of violating
 16 H&S Code section 11351.5 (presumably based on his October and November arrests) and one
 17 count of violating H&S Code section 11352. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at
 18 Ex.02204.

19 BB. John Doe-28

20 At the same time that SFPD officers arrested Doe-27 for selling crack cocaine on [REDACTED]
 21 November 13, 2013, *see supra*, they also arrested “another Hispanic male” named [REDACTED]
 22 (“John Doe-28”). Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00202. Doe-28 was standing
 23 “right next to” Doe-27 at the corner of Turk and Hyde Streets when officers approached to arrest
 24 Doe-27; Doe-28 then fled. *Id.* One of the officers grabbed Doe-28 by his sweatshirt, and Doe-
 25 28 spit six rocks of crack cocaine onto the sidewalk. *Id.* Upon searching Doe-28, officers found
 26 27
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1 \$159 and no paraphernalia for ingesting crack. *Id.*

2 Doe-28 was transported to Tenderloin Station where officers learned that he had an
 3 outstanding felony warrant based on his failure to appear in Superior Court for case number
 4 13022119. *Id.* In that case, Doe-28 was charged with violating H&S Code section 11352(a)
 5 based on an arrest that occurred just three months earlier at another location in the Tenderloin
 6 (the corner of Polk and Olive Streets). *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at
 7 Ex.02178.

8 Doe-28 was again arrested for drug trafficking in the Tenderloin (Larkin and O'Farrell
 9 Streets) just a few months after his November 2013 arrest. *See id.* That arrest, on March 11,
 10 2014, also led to charges under H&S Code section 11352(a). *Id.*

11 CC. John Doe-29

12 On September 10, 2014, SFPD officers arrested [REDACTED] “(John Doe-29”) for the
 13 third time in the past two months – all for drug-trafficking crimes, and all near Hyde Street in the
 14 Tenderloin. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00495; Ex. 1, Koeninger Disco.
 15 Mtn. Decl., Att. F at Ex.02171. According to the reporting officer, he was surveilling the
 16 intersection of Hyde and Fulton Streets for “narcotics dealings” when he “observed a Latin
 17 male” (Doe-29) whom the officer recognized “as a suspected cocaine base dealer who we have
 18 arrested on two prior occasions in the past two months.” Ex. 1, Koeninger Disco. Mtn. Decl.,
 19 Att. A at Ex.00495. After Doe-29 reportedly sold crack to a White male, both Doe-29 and the
 20 buyer were arrested. *Id.* One crack rock was recovered from the buyer, and Doe-29 was found
 21 in possession of \$149. *Id.* at Ex.00496. When Doe-29 was later booked at Tenderloin Station,
 22 the officers confirmed that he had two open court cases in S.F. Superior Court, both for drug-
 23 trafficking charges. *Id.* Doe-29’s open cases were based on a July 28, 2014 arrest, and an arrest
 24 five days earlier on July 23, 2014. *Id.*

25 Defense counsel has not yet obtained the incident report related to Doe-29’s July 28
 26 arrest, but the report detailing his July 23 arrest indicates that Doe-29 was arrested for selling
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1 crack in the area of Hyde Street and Golden Gate Avenue. Ex. 1, Koeninger Disco. Mtn. Decl.,
 2 Att. D at Ex.00763-00768. While searching Doe-29, the SFPD officers found one crack rock in
 3 Doe-29's pant pocket. Many of the same officers were involved in Doe-29's September 10 and
 4 July 23 arrests. *Compare id.*; Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00492-00493.

5 Ultimately, Doe-29 was charged in three separate cases in Superior Court, all of which
 6 alleged drug-trafficking crimes. *See* Ex.1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02171.
 7 The latter two of Doe-29's cases also charged him under Cal. Penal Code section 12022.1(a),
 8 which prohibits the commission of a felony while released on bail. *Id.*

9 DD. John Doe-30

10 On December 2, 2014, SFPD officers arrested [REDACTED] ("John Doe-30") at the
 11 intersection of Larkin and O'Farrell Streets for selling crack cocaine to an undercover officer.³⁷
 12 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00413-00416. At the time of his arrest, Doe-30
 13 was in possession of \$435. *Id.* at *Id.* at Ex.00761. This was not Doe-30's first arrest for
 14 trafficking crack cocaine. Doe-30 was also arrested by SFPD on January 15, 2013 near the
 15 corner of Larkin Street and Golden Gate Avenue. Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at
 16 Ex.00761. During that incident, officers recovered twelve rocks of crack cocaine. *Id.*

17 Doe-30's December 2014 and January 2013 arrests both led to charges being filed in
 18 Superior Court. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02143.

19 EE. John Doe-31

20 When SFPD officers arrested [REDACTED] ("John Doe-31") on July 3, 2014, it was
 21 third time he had been arrested for trafficking crack cocaine in the preceding six-month period.
 22 Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00678-00683; Ex.00684-00690; Ex.00691-
 23 00697. All three arrests took place near the corner of Larkin and O'Farrell Streets, an "area

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 26 ³⁷ The SFPD incident report identifies Doe-30 as Hispanic ("H"). *Id.* at Ex.00413.
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1 notorious for round the clock sales of narcotics.” *Id.* at Ex.00690. During the July 3 incident,
 2 one SFPD officer approached “a Hispanic male” (Doe-31) at 781 O’Farrell Street and purchased
 3 one crack rock from him. *Id.* at Ex.00694. SFPD recovered twenty-four more crack rocks from
 4 Doe-31’s mouth as he was being arrested. *See id.* During booking, officers “confirmed that
 5 [Doe-31] had two local felony narcotics warrants for his arrest,” that he had an active stay-away
 6 order for the intersection of Larkin and O’Farrell, and that he “ha[d] been arrested this year on
 7 two prior occasions for cocaine base sales in the area” of Larkin and O’Farrell Streets. *Id.* at
 8 Ex.00694-00695. As a result of the July 2014 arrest, Doe-31 was charged in Superior Court with
 9 violating H&S Code sections 11351.5 and 11352(a), as well as a contempt of court charge
 10 related to the stay-away order. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02321.

11 Doe-31’s two prior crack cocaine arrests occurred on April 16, 2014 and January 9, 2014.
 12 During the April incident, Doe-31 sold two crack rocks to an undercover officer and was found
 13 in possession of ten more upon his arrest. Ex. 1, Koeninger Disco. Mtn. Decl., Att. D, Ex.00681-
 14 00682. During the January incident, Doe-31 was observed selling one rock to an individual, and
 15 he was later arrested with fourteen individually wrapped crack rocks in his mouth. *Id.* at
 16 Ex.00681.

17 FF. John Doe-32

18 [REDACTED] (“John Doe-32”) was twice arrested by SFPD officers for selling crack cocaine
 19 in the Tenderloin during a two-week span in 2013. The first arrest occurred on September 27,
 20 2013 near the corner of Hyde and Eddy Streets. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A,
 21 Ex.00536-00540. Two officers became suspicious of a “group of five Hispanic men” (including
 22 Doe-32) who were standing at the corner of Hyde and Eddy, and their investigation ultimately
 23 resulted in Doe-32’s arrest. *Id.* at Ex.00536-00539. During that arrest, officers recovered eight
 24 individually wrapped baggies of crack cocaine from Doe-32’s front pant pocket. *Id.* at
 25 Ex.00539.

26 Next, on October 10, 2013, Doe-32 was arrested near the corner of Larkin and O’Farrell

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1 Streets after officers observed him sell two rocks of crack cocaine to another person. Ex. 1,
 2 Koeninger Disco. Mtn. Decl., Att. D, Ex.00753-00757. The officers arrested both Doe-32 and
 3 the purchaser; they recovered \$176 from Doe-32 and two crack rocks from the purchaser. *Id.* at
 4 Ex.00752.

5 Doe-32 was ultimately charged in S.F. Superior Court with one count of violating H&S
 6 Code section 11351.5 (based on the September arrest) and one count of violating H&S Code
 7 section 11352(a) (based on the October arrest). Ex. 41, Amram Disco. Mtn. Decl., Att. O at
 8 Ex.04257-58.

9 GG. Jane Doe-33

10 After observing the driver of a parked vehicle engage in a suspected drug transaction with
 11 a passerby, SFPD officers approached the vehicle, parked at 205 Eddy Street, to investigate. Ex.
 12 1, Koeninger Disco. Mtn. Decl., Att. A, Ex.00624. The driver of the vehicle identified himself,
 13 and the officers learned he was on felony probation with an arrest warrant. *Id.* The officers
 14 ordered the driver from the car and arrested him; to conduct a search of the vehicle, the officers
 15 also ordered a female passenger, [REDACTED] (“Jane Doe-33”),³⁸ from the car. *Id.* at
 16 Ex.00624. As Doe-33 exited the vehicle, she grabbed a pouch from the car’s front seat and
 17 “shoved it into her front waistband.” *Id.* The officers directed her to remove the pouch and
 18 leave it in the vehicle. *Id.* Inside the pouch, officers found \$800. *Id.*
 19

20 The officers also found a black purse in the vehicle; inside the purse, they found: 5.8
 21 grams (gross) of methamphetamine; 4.9 grams (gross) of crack cocaine; 5.3 grams (gross) of
 22 heroin; twenty-four clonazepam pills; twenty-five hydrocodone pills; thirty methadone pills; five
 23 oxycodone pills; two alprazolam pills; and one codeine pill. *Id.* at Ex.00619-25. Because the
 24 purse contained medicine bottles in Doe-33’s name, the officers believed it belonged to her. *Id.*
 25 at Ex.00624. When Doe-33 was later booked at Tenderloin Station, officers found \$103 inside
 26

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28 ³⁸ The SFPD incident report identifies Doe-33 as Asian (“A”). Ex.00617.

1 her bra.

2 Based on the foregoing, Doe-33 was charged in Superior Court with violating H&S Code
 3 sections 11351, 11351.5, and 11378. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02169.
 4 Prior to this incident, Doe-33 had been arrested for drug-trafficking in the Tenderloin on at last
 5 three other occasions, all of which resulted in state court charges. *See* Ex. 1, Koeninger Disco.
 6 Mtn. Decl., Att. F at Ex.02169 (August 2008 arrest at 420 Eddy Street; November 2007 arrest at
 7 6th and Stevenson Streets; July 2006 arrest at 433 Ellis Street).

8 HH. John Doe-34

9 On July 5, 2014, SFPD officers arrested [REDACTED] (“John Doe-34”) for selling
 10 crack cocaine near the corner of Larkin and O’Farrell Streets. Ex. 1, Koeninger Disco. Mtn.
 11 Decl., Att. D, Ex.00701. Doe-34 had “36 individually wrapped off white rocks” of crack cocaine
 12 in his possession. *Id.* Doe-34 was booked at Tenderloin Station, and the officers learned that he
 13 “ha[d] an open case in San Francisco for 11352(a) HS and 11351.5 H&S.” *Id.* The arrest
 14 underlying that case happened February 26, 2014 – also at Larkin and O’Farrell Streets. *Id.*
 15 Because of that open case, Doe-34 also had a stay-away order for the corner of Larkin and
 16 O’Farrell streets. *Id.*; *see also* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02150.
 17

18 On September 13, 2014, Doe-34 was once again arrested near the corner of O’Farrell and
 19 Larkin Streets for drug-trafficking. *See id.* That arrest, too, led to Superior Court charges under
 20 H&S Code section 11352(a). *Id.*

21 II. John Doe-35

22 On September 2, 2014, [REDACTED] (“John Doe-35”) was arrested by SFPD officers at
 23 the corner of Hyde Street and Golden Gate Avenue. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A,
 24 Ex.00455. Moments earlier, the officers had seen Doe-35³⁹ sell crack cocaine to another
 25

26 ³⁹ The SFPD incident report identifies Doe-35 as Hispanic (“H”).
 27

1 individual. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A, Ex.00455. After detaining the buyer and
 2 recovering two individually wrapped crack rocks from his person, the officers arrested Doe-35.
 3 *Id.* During his arrest, Doe-35 spat fourteen individually wrapped rocks of crack cocaine from his
 4 mouth, and officers found \$181 on his person. *Id.* Doe-35 was charged with violating H&S
 5 Code sections 11351.5 and 11352. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02410-11.

6 One week later, on September 10, the SFPD arrested Doe-35 again for trafficking crack
 7 cocaine in the Tenderloin (933 Geary Street). Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at
 8 Ex.02133. Doe-35 was again charged in Superior Court with violating H&S Code section
 9 11351.5. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02415-16.

10 On January 14, 2015 (four months after the above-described arrests), Doe-35 was
 11 arrested at the corner of Fulton and Hyde Streets for trafficking crack cocaine. Ex. 2, Ultan
 12 Disco. Mtn. Decl., Att. B at Ex.02402-03. He was again charged in Superior Court with
 13 violating H&S Code sections 11351.5 and 11352. *Id.*

14 JJ. John Doe-36

15 When [REDACTED] (“John Doe-36”) was charged on March 3,
 16 2014 with violating H&S Code section 11351.5, it was the third time that he had been charged in
 17 Superior Court for dealing crack cocaine near Larkin and O’Farrell Streets. Ex. 2, Ultan Disco.
 18 Mtn. Decl., Att. B at Ex.02655-56; Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02155.⁴⁰
 19 Doe-36 was previously charged with trafficking crack at the same location in January 2013 and
 20 in August 2008. See Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02686-87; Ex.02723; Ex. 1,
 21 Koeninger Disco. Mtn. Decl., Att. F at Ex.02155. When Doe-36 was charged in 2014 and 2013,
 22 both cases alleged his 2009 prior conviction under H&S Code section 11352 (the result of his
 23 2008 case). Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02686; Ex.02655.

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 25
 26⁴⁰ The CMS data indicates that Doe-36 is either White (“W”) or “Other” (“O”).
 27

1 KK. John Doe-37

2 [REDACTED] ers responded to 421 Ellis Street on August 7, 2014 and found [REDACTED]
 3 [REDACTED] (“John Doe-37”). Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00277. As
 4 officers approached him, Doe-37⁴¹ threw an unidentified object to the ground. *Id.* at Ex.00277.
 5 The officers ordered him to “stop and get against the wall,” purportedly in order to issue him a
 6 citation for littering. *Id.* Upon inspecting the thrown object, the officers saw it was a bag
 7 containing multiple rocks of crack cocaine (4.9 grams gross). *Id.* Doe-37 was arrested and
 8 found with marijuana and \$512. *Id.* at. Ex.00275-77.

9 Doe-37 was taken to Tenderloin Station and booked for violating H&S Code section
 10 11351.5. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00277. A records check also
 11 revealed Doe-37 “was on Supervised Pretrial Release” from another case and “that he had an
 12 outstanding warrant.” *Id.* Prior to the foregoing arrest, Doe-37 had at least twice faced drug-
 13 trafficking charges in S.F. Superior Court: once in February 2006 and again in November 2009.
 14 See Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02168.

15 LL. John Doe-38

16 On October 15, 2013, SFPD officers patrolling the 700 block of O’Farrell Street
 17 (between Larkin and Hyde Streets) saw [REDACTED] (“John Doe-38”),⁴² who they knew
 18 “from prior police contacts.” Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00059. The
 19 officers also “knew that [Doe-38] is a methamphetamine dealer”⁴³ and was “on active CDC
 20 parole [] with a warrantless search and seizure condition.” Ex. 1, Koeninger Disco. Mtn. Decl.,
 21 Att. A at Ex.00059.

22 _____
 23 ⁴¹ The SFPD incident report identifies Doe-37 as Hispanic (“H”). *Id.* at Ex.00275.

24 ⁴² The SFPD incident report identifies Doe-38 as Hispanic (“H”). Ex.00059.

25 ⁴³ According to the CMS system for San Francisco Superior Court, Doe-38 previously had been
 26 prosecuted under H&S Code section 11378 in July 2010 and June 2011. Ex. 1, Koeninger Disco.
 27 Mtn. Decl., Att. F at Ex.02157. He also was prosecuted under section 11378 in May 2014. *Id.*

1 As the officers approached Doe-38, he ran westbound on O'Farrell Street and dropped a
 2 cigarette box to the ground. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00059. Doe-38
 3 was detained and a search of the cigarette box yielded 19.6 grams (gross) of methamphetamine.
 4 *Id.* The officers also found \$465 on Doe-38's person and a California identification card
 5 belonging to the victim of a battery four months earlier. *Id.* Based on the quantity of the meth
 6 and the absence of any paraphernalia with which Doe-38 could ingest it, he was booked for
 7 violating H&S Code section 11378 and parole. *Id.*

8 MM. John Doe-39

9 On August 16, 2014, SFPD officer responded to Hyde Street at UN Plaza regarding a
 10 report of illegal narcotics activity in the area. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
 11 Ex.00664. There, they saw [REDACTED] ("John Doe-39")⁴⁴ illegally riding his bicycle on the
 12 sidewalk. *Id.* The officers detained Doe-39 to issue a traffic citation, and a computer search
 13 revealed that "he was on active probation." *Id.* The officers conducted a probation search of his
 14 person and found 4.9 grams (gross) of powder cocaine in fourteen "individually wrapped
 15 bindles." *Id.*

16 NN. John Doe-40

17 While conducting a surveillance operation on December 5, 2013 at the intersection of
 18 Hyde and Turk Streets, SFPD officers observed [REDACTED] ("John Doe-40") engage in a
 19 suspected narcotics transaction. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00605.⁴⁵ The
 20 officers arrested Doe-40 and found two crack rocks on his person. *Id.* The officers found one
 21 crack rock on the person of the woman to whom he sold. *Id.* Doe-40 was subsequently charged
 22 in S.F. Superior Court under H&S Code sections 11352(a), 11351.5, and 11350(a). Ex. 1,
 23 Koeninger Disco. Mtn. Decl., Att. F at Ex.02182.

24 ⁴⁴ The SFPD incident report identifies Doe-39 as Hispanic ("H").

25 ⁴⁵ The SFPD incident report identifies Doe-40 as Hispanic ("H"). *Id.*

1 OO. John Doe-41

2 While “conducting a narcotics surveillance operation in the area of Golden Gate/Hyde
3 Street” on December 26, 2013, SFPD officers “observed a Hispanic male,” [REDACTED] (“John
4 Doe-41”), standing on the street corner. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00254.
5 The officers were aware that Doe-41 was “a known narcotics dealer in the area.” *Id.* In fact, two
6 months earlier, two of the same officers “placed [Doe-41] under arrest at the same intersection
7 for cocaine base sales.” *Id.*

8 The officers saw Doe-41 spit two “off white rocks” and give them to man who had just
9 given him “U.S. currency.” *Id.* After arresting the buyer, the officers recovered two rocks of
10 crack cocaine from his pocket. *Id.* Their arrest of Doe-41 yielded \$217. *Id.*

11 PP. John Doe-42

12 On December 10, 2013, an SFPD officer was patrolling the Tenderloin on a motorcycle.
13 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00609. At the intersection of Turk and Hyde,
14 the officer saw a Hispanic male, [REDACTED] (“John Doe-42”), riding his bicycle against traffic
15 on Hyde Street. *Id.* The officer conducted a traffic stop, and during a subsequent search of Doe-
16 42’s person, the officer found five pills, “three packages of methamphetamine . . . packaged for
17 sales” and an “amount of heroin” that was “not for personal use.” *Id.* at Ex.00609-610.

18 Doe-42 was booked at Tenderloin Station for violating H&S Code sections 11351,
19 11375(b)(2), and 11378. According to San Francisco’s CMS, Doe-42 has previously been
20 charged with drug-trafficking crimes on six prior occasions: January 2012; April 2011;
21 December 2010; February 2010; November 2009; and March 2001. *See* Ex. 1, Koeninger Disco.
22 Mtn. Decl., Att. F at Ex.02158.

23 **VI. Incidents of Racial Bias by SFPD Generally**

24 A. Racial disparity

25 A study by the Haywood Burns Institute that was commissioned by the Reentry Council of

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1 the City and County of San Francisco shows that Black adults are 7.1 times as likely as White
 2 adults to be arrested, 11 times as likely to be booked into County Jail and 10.3 times as likely to
 3 be convicted of a crime in San Francisco. Declaration of Galia Amram Phillips In Support of
 4 July 2015 Case Management Statement (“July CMC Decl.”), Exh. A. [Docket. No. 44]. The
 5 study also showed that despite a significant reduction in arrest rates in San Francisco, the
 6 disparity gap – the relative rate of arrest for Black adults compared to White adults – is
 7 increasing, including for drug offenses. *Id.* at 15. The data is particularly stark for Black
 8 women. They represent 5.8% of the city’s female population but account for 45.55% of all
 9 female arrests in 2013, and 68.8% of narcotics arrests. Ex. 41, Amram Disco. Mtn. Decl., Att. B.
 10 Blacks in San Francisco are also cited for resisting arrest at a rate eight times greater than Whites
 11 even when serious crimes are not involved. Ex. 41, Amram Disco. Mtn. Decl., Att. C. “Data
 12 and sentiment shows that women and men of color are disproportionately stopped or questioned
 13 by police.” Ex. 41, Amram Disco. Mtn. Decl., Att. D (quoting SF Supervisor Malia Cohen when
 14 explaining her proposed ordinance to require SFPD officers to collect data on the race of all
 15 people stopped by law enforcement).

16 B. Racist texts

17 On February 25, 2014, the USAO filed criminal charges, including drug charges, civil
 18 rights violations and fraud charges, against three SFPD officers: Ian Furminger, Edmond Robles
 19 and Reynaldo Vargas. Indictment, *United States v. Edmond Robles et al*, No. 14cr102 (N.D. Cal.
 20 filed 02/25/14) (Docket No. 1); Superseding Indictment, *United States v. Edmond Robles et al*,
 21 No. 14cr102 (N.D. Cal. filed 10/30/14) (Docket No. 113). In November 2014, the case went to
 22 trial, and both Furminger and Robles were convicted of various counts. Minute Order, *United*
 23 *States v. Edmond Robles et al*, No. 14cr102 (N.D. Cal. filed 12/01/14) (Docket No. 174); Verdict
 24 Form, *United States v. Edmond Robles et al*, No. 14cr102 (N.D. Cal. filed 12/05/14) (Docket No.
 25 180). On March 31, 2015, the USAO filed a declaration in the Robles/Furminger case from FBI
 26 Agent Tyler Nave (“Nave Declaration”). The Nave Declaration was in response to Furminger’s
 27

1 motion for bail pending the appeal of his conviction. The Nave Declaration revealed racist text
 2 messages involving at least four SFPD officers including Furminger. Phillips Related Case
 3 Decl., Att. I [Docket No. 247-1 in *United States v. Furminger*, No. 14-102 CRB].

4 Although Nave did not state the exact date that he obtained the text messages, Nave did
 5 declare that the FBI obtained the test messages “[d]uring the investigation that led to this case.”
 6 *Id.* at ¶ 2.⁴⁶ Moreover, on November 5, 2014, SFPD Officer Robles filed a Motion In Limine to
 7 exclude a test message from trial in which Robles texted the word “nigga” to SFPD Officer
 8 Furminger. Defendant Edmond Robles’ Motion To Exclude Evidence Of Text Messages at 1,
 9 *United States v. Edmond Robles et al*, No. 14cr102 (N.D. Cal. filed 11/05/14) (Docket No. 122).
 10 So presumably, the USAO was aware of the text messages at least before the 2014 Operation
 11 Safe Schools sweep.

12 In the text messages, the officers use the phrase “White Power!” They also state:

- 13 1) “We got two blacks at my boys school and they are brother and sister! There cause dad
 works for school district and I am watching them like hawks.”
- 14 2) “Do you celebrate quanza at your school? Yeah we burn the cross on the field! Then we
 celebrate Whitemas.”
- 15 3) “Its worth every penny to live here away from the savages.”
- 16 4) “Those guys are pretty stupid! Ask some dumb ass questions you would expect from a
 black rookie!”
- 17 5) “The buffalo soldier was why the indians Wouldn’t shoot the niggers that fought for the
 confederate They though they were sacred buffalo and not human.”
- 18 6) “They were not far off Marley was a nigger.”
- 19 7) “the indians never had shit Columbus thought he landed where he headed India So HE
 named them indians They never had a name of their own And the n re is evidence that the

25 ⁴⁶ There is an allegation that the supervisors in the SFPD knew about the texts as early as 2012.
 26 Ex. 41, Amram Disco. Mtn. Decl., Att. E.

- 1 moors niggers were here first.”
- 2 8) “Gunther Furminger was a famous slave auctioneer.”
- 3 9) “I cant imagine working At Costco and hanging out with filthy flips. hate to sound racist
4 but that group is disgusting.”
- 5 10) “He would be so much better off had he married a white chick with a brain he would
6 have a nice house with white kids that were not as ghetto as his are.”
- 7 11) “Just saw on news there was a peace march in oakland. everyone marching was white.”
- 8 12) “My wife has 2 friends over that dont know each other the cool one says to me get a
9 drink nigger not knowing the other is married to one just happened right now LMFAO.”
- 10 13) “[name redacted] walked up to [name redacted] and said Break yo-self nigga! Then
11 [name redacted] said, dont make me go old school on yo bitch ass nigga!”
- 12 14) White Power Family, [Furminger home address redacted]
- 13 15) “All good, I still hate black people!”
- 14 16) “Niggers should be spayed.” “I saw one an hour ago with 4 kids. See. That would be
15 four less.”
- 16 17) “I am just leaving it like it is, painting KKK on the sides and calling it a day!”
- 17 18) “Cross burning lowers blood pressure! I did the test myself!”
- 18 19) “So do I. Every camping trip i burn an image of the prez.”
- 19 20) “At his school! Multi purpose room! Their shouldnt be any blacks!”
- 20 21) “All niggers must fucking hang.”
- 21 22) “Just boarded train at Mission/16th.” “Ok, watch out for BM’s.” “Too late. I’m
22 surrounded. And the only gun I have is broken!” “Your fucked.” “Dumb nig nugs.”
- 23 23) “20,000 bees are in Vacaville near School but they are not dangerous like black people.”
- 24 24) “You are a total homo! And your gay!”
- 25 25) “We decided to chill but ended up going to BC house for first half of fight! Home around
26 9 ish.” “Cool...who won that...cotto..not” “No, the nigger!”
- 27

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- 1 26) “I hate to tell you this but my wife friend is over with their kids and her husband is black!
 2 If is an Attorney but should I be worried.” “Get ur pocket gun. Keep it available in case
 3 the monkey returns to his roots. Its not against the law to put an animal down.” “Well
 4 said!” “U may have to kill the half breed kids too. Don’t worry. Their an abomination
 5 of nature anyway.”
- 6 27) “Dude. Your boy made Q50. Sgt. Aj Holder.” “Fuckin nigger.” “Lol and Yolanda
 7 Williams.” “Or my.” “Nigger bitch.”
- 8 28) “Your sister lies more than any nigger I have ever met in my life. You awake?”

9
 10 Phillips Related Case Decl., Att. I [Docket No. 247-1 in *United States v. Furminger*, No. 14-102
 11 CRB].

12 **VII. Evidence of Racial Bias in Operation Safe Schools Officers and in Tenderloin
 13 Policing**

14 A. Evidence of Racial Bias Produced in Discovery in Operation Safe Schools Cases

15 In the video produced in *United States v. Acacia McNeal*, No. 15-028 CRB, while the
 16 camera is trained on a group of two Black women and two Black men, a law enforcement officer
 17 is heard loudly stating “fucking BMs.” Phillips Related Case Decl., Att. F,
 18 20141201163257.MTS, at 00:45. Immediately after this exclamation, another officer warns, in
 19 an apparent reference to the running video, “shh, hey, I’m rolling.” *Id.* In response to a defense
 20 request, the government revealed which officer made the “fucking BM” comment, and which
 21 officer said “shh, hey, I’m rolling.” Ex. 5, Under Seal Declaration of Galia Amram Phillips in
 22 Support of Motion to Compel Discovery on Selective Prosecution and Enforcement, ¶ 5 at
 23 Ex.02857. Those officers worked on at least 17 other Operation Safe School cases. Ex. 2, Ultan
 24 Related Case Decl., ¶¶ 2-3 at Ex.02232-33.

25 In the video produced in discovery in *United States v. Cassie Roberts*, No. 13-760 CRB,
 26 the undercover informant tries to buy drugs from Ms. Roberts, a Black woman. Ms. Roberts,

1 who is on the phone, doesn't respond initially. An Asian woman approaches the confidential
 2 informant and offers to sell drugs, but the informant declines and waits for Ms. Roberts to get off
 3 of the phone. Phillips Related Case Decl., Att. G at 06:45 and 13:15 (recording the informant
 4 explaining to the agents that Ms. Roberts was not paying attention to him [the informant], but he
 5 got her attention and avoided the "Asian chick" by saying he wants the "good shit.").

6 B. Incidents of Racial Bias By SFPD Officers In The Tenderloin

7 These specific incidents described above, caught on videotape, mirror years of poor
 8 treatment of Blacks by law enforcement officers in the Tenderloin. Dominique Leslie, who has
 9 worked in the Tenderloin area for 15 years, notes that:

10
 11 I have lived and worked in the Tenderloin area for fifteen (15) years and have
 12 personal experience interacting with and observing police officers in San
 13 Francisco's Tenderloin neighborhood. In July of 2015, we moved our office from
 14 472 Turk Street to 233 Eddy Street. At our Turk Street address, most of the hand
 15 to hand street drug transactions I observed were being conducted by Hispanics,
 16 with seemingly very little police activity. At our Eddy Street location most hand
 17 to hand street drug transactions I witness are conducted by African Americans,
 18 where I have observed a large and seemingly disproportionate presence of police
 19 activity as compared to our Turk Street location. The amount of hand to hand
 20 transactions I observe are every bit as frequent now as they were a year ago, and
 21 the police focus on African American drug dealers over other ethnic group drug
 22 dealers seems to be the same as a year ago.

23 Ex. 36, Declaration of Dominique Leslie, ¶¶ 1-3 at Ex.3066-70.

24 In addition, Operation Safe Schools defendants – including some who are not part of this
 25 motion – have signed and submitted sworn declarations concerning the treatment they have
 26 experienced by police officers in the Tenderloin. Like Dominique Leslie, the Operation Safe
 27 School defendants are aware that law enforcement officers in the Tenderloin routinely give more
 28 attention to Blacks than individuals of other races. Ex. 37, Declaration of Erwin Mackey, ¶ 3 at
 Ex.03071-72; Ex. 31, Declaration of Shavon Gibson, ¶ 2 at Ex.03044-46; Ex. 29, Declaration of
 Wendell Johnson, ¶ 2 at Ex.03034-38; Ex. 7, Declaration of Saquita Nash, ¶ 3 at Ex.02935-39;
 Ex. 8, Declaration of Aaron Mathews, ¶ 2 at Ex.02940-41; Ex. 9, Declaration of Acacia McNeal,

¶ 2 at Ex.02942-46; Ex. 10, Declaration of Angela Jones, ¶ 2 at Ex.02947-51; Ex. 11, Declaration of Anita Dixon, ¶ 2 at Ex.02952-56; Ex. 12, Declaration of Crystal Anthony, ¶ 2 at Ex.02957-61; Ex. 13, Declaration of Darrell Powell, ¶ 2 at Ex.02962-63; Ex. 14, Declaration of Darlene Rouse, ¶ 2 at Ex.02964-68; Ex. 15, Declaration of Hobert Lee, ¶ 2 at Ex.02969-73 (noting that when he is accompanied by his Caucasian wife, officers do not question her as they do him); Ex. 16, Declaration of Lakeysha White, ¶ 2 at Ex.02974-78; Ex. 17, Declaration of Matthew Mumphrey, ¶ 2 at Ex.02979-83; Ex. 18, Declaration of Mellina Williams, ¶ 2 at Ex.02984-88; Ex. 19, Declaration of Nijah Reed, ¶ 2 at 02989-90; Ex. 20, Declaration of Sholanda Adams, ¶ 2 at 02991-95; Ex. 21, Declaration of Tiana Reddic, ¶ 2 at Ex.02996-03000; Ex. 22, Declaration of William Brown, ¶ 2 at Ex.03001-02; Ex. 35, Declaration of Ebony Wallace, ¶ 2 at Ex.03060-65.

As Erwin Mackey explained: “Police patrols and arrests in the Tenderloin primarily occur on blocks occupied by African American individuals … In my experience, the police do not harass, arrest or conduct raids on the Honduran dealers that sell within blocks of the Federal Building. They also do not appear to harass the Hondurans that sell drugs on Hyde Street or the Filipino dealers that are concentrated on Leavenworth Avenue between Turk and Eddy Streets.” Ex. 37, Mackey Decl., ¶ 4 at Ex.03071-72. As described in detail below, police harassment of Blacks in the Tenderloin has taken many forms.

1. Use Of Racial Slurs By SFPD Officers In The Tenderloin

Defendants have also heard law enforcement officers in the Tenderloin use racial slurs. Shavon Gibson, Wendell Johnson, Latoya Jackson, David Madlock, Lakeysha White, Acacia McNeal, Jamella Jules and Anita Dixon have all heard officers refer to Black females as “black bitches.” Ex. 31, Gibson Decl., ¶ 4 at Ex.03044-46; Ex. 29, Johnson Decl., ¶ 3 at Ex.03034-38; Ex. 34, Jackson Decl., ¶ 2 at Ex.03055-59; Ex. 16, White Decl., ¶ 3 at Ex.02974-78; Ex. 24, Jules Decl., ¶ 2 at Ex.03008-12; Ex. 23, Madlock Decl., ¶ 2 at Ex.03003-07; Ex. 9, McNeal Decl., ¶ 3 at Ex.02942-46; Ex. 11, Dixon Decl., ¶ 3 at Ex.02952-56. Tiana Reddic has been

1 called “little black girl” by Officer Ryan. Ex. 21, Reddic Decl., ¶ 5 at Ex.02996-03000. *See also*
 2 Ex. 30, Cross Decl., ¶ 2 at Ex.03039-43; Ex. 35, Wallace Decl., ¶ 3 at Ex.03060-65; Ex. 7, Nash
 3 Decl., ¶ 5 at Ex.02935-39; Ex. 9, McNeal Decl., ¶ 3 at Ex.02942-46; Ex. 12, Anthony Decl., ¶ 3
 4 at Ex.02957-61; Ex. 19, Reed Decl., ¶ 3 at Ex.02989-90 (describing being referred to, or hearing
 5 a Tenderloin officer refer to a Black woman, as “bitch”). SFPD Officer Crosby made a comment
 6 to Crystal Anthony like “you stuffing shit in your pussy bitch.” Ex. 12, Anthony Decl., ¶ 3 at
 7 Ex.02957-61. Angela Jones has heard SFPD officers “refer to people as ‘bitches’ and use
 8 phrases such as ‘sit your black ass down’ when speaking to African-American people.” Ex. 10,
 9 Jones Decl., ¶ 4 at Ex.02947-51.

10 David Madlock has been referred to as “boy,” by Caucasian police officers in the
 11 Tenderloin. Ex. 23, Madlock Decl., ¶ 3 at Ex.03003-07. And three others have heard SFPD
 12 officers in the Tenderloin refer to Black men as “boy.” Ex. 35, Wallace Decl., ¶ 3 at Ex.03060-
 13 65; Ex. 29, Johnson Decl., ¶ 3 at Ex.03034-38; Ex. 24, Jules Decl., ¶ 2 at Ex.03008-12. Five
 14 people have heard officers in the Tenderloin use the word “nigger.” Ex. 29, Johnson Decl., ¶ 3 at
 15 Ex.03034-38; Ex. 34, Jackson Decl., ¶ 2 at Ex.03055-59; Ex. 16, White Decl., ¶ 3 at Ex.02974-
 16 78; Ex. 24, Jules Decl., ¶ 2 at Ex.03008-12; Ex. 22, Brown Decl., ¶ 3 at Ex.03001-02. An SFPD
 17 officer whom Erwin Mackey knows “as Darren yelled that I ‘better get [my] black ass off the
 18 block.’” Ex. 37, Mackey Decl., ¶ 3 at Ex.03071-72. Moreover, in 2014, Ebony Wallace
 19 witnessed Officers Goff, Scafani and another SFPD officers harass a small group of Black
 20 teenagers. One of the officers told the group, “Hands up, don’t shoot!” Wallace believed the
 21 comment was intended to make fun of the Black Lives Matter Movement. Ex. 35, Wallace
 22 Decl., ¶ 7 at Ex.03060-65.

23

24 **2. Incidents of Sexually Inappropriate Behavior By SFPD Officers
Against Black Women**

25

26 Many of the defendants have also witnessed San Francisco police officers act sexually
 27 inappropriately toward Black females. Ex. 30, Declaration of Tiffany Cross, ¶ 3 at Ex.03039-43;

1 Ex. 35, Wallace Decl., ¶ 4 at Ex.03060-65; Ex. 7, Nash Decl., ¶ 3 at Ex.02935-39; Ex. 18,
 2 Williams Decl., ¶ 3 at Ex.02984-88; Ex. 17, Mumphrey Decl., ¶ 3 at Ex.02979-83; Ex. 8,
 3 Mathews Decl., ¶ 3 at Ex.02940-41; Ex. 12, Anthony Decl., ¶ 4 at Ex.02957-61; Ex. 23,
 4 Declaration of David Madlock, ¶ 4 at Ex.03003-07; Ex. 24, Declaration of Jamella Jules, ¶ 3 at
 5 Ex.03008-12; Ex. 16, White Decl., ¶ 4 at Ex.02974-78; Ex. 19, Reed Decl., ¶ 4 at Ex.02989-90;
 6 Ex. 21, Reddic Decl., ¶ 3 at Ex.02996-03000; Ex. 34, Declaration of Latoya Jackson, ¶ 3 at
 7 Ex.03055-59. There is a well-documented connection between racism and sexual violence
 8 against Black women. Ex. 41, Amram Disco. Mtn. Decl., Att. P (Article from the National
 9 Resource Center on Domestic Violence on Sexual Violence in the Lives of African-American
 10 Women); Danielle McGuire, *At the Dark End of the Street: Black Women, Rape and Resistance*
 11 –*A New History of the Civil Rights Movement from Rosa Parks to the Rise of Black Power*, New
 12 York: Knopf (2010).⁴⁷

13 Officer Ryan, who worked on Operation Safe Schools, is a particular problem. In or
 14 around 2008, while transporting Acacia McNeal to the San Francisco County Jail, Ryan said “I
 15 just got married and you better be glad . . . or I’ll take some black pussy.” Ex. 9, McNeal Decl.,
 16 ¶ 5 at Ex.02942-46. In February 2013, Ryan made a comment to Angela Jones during an arrest
 17 that “You should be doing something else with that body, you could making that money doing
 18 something else other than selling drugs.” Ex. 10, Jones Decl., ¶ 5 at Ex.02947-51. Darlene
 19 Rouse has heard Ryan “make statements such as, ‘I like big titties,’ and ‘you look just like my
 20 wife.’” Ex. 14, Rouse Decl., ¶ 4 at Ex.02964-68. Ryan has made statements to Jamella Jules
 21 about the size of his penis. He implied that it was large. In 2009, while talking to Jules, Ryan
 22 pointed to a woman and said, “Do you see the girl back there? If you suck dick like her then
 23 you’ll get out of trouble too.” Ex. 24, Jules Decl., ¶ 3 at Ex.03008-12. Tiffany Cross has also
 24

25 ⁴⁷ In addition, some officers who mistreated Black women also used racial slurs. See e.g. *supra*
 26 and *infra* (noting that Officer Ryan used the term “little black girl,” and “I’ll take some black
 27 pussy.”)

had disturbing interactions with Ryan. On one occasion, as Cross was walking with a friend, Ms. Turner, Ryan approached while driving his police vehicle. He rolled down the window and asked Ms. Turner, “When are you going to suck my dick?” Ex. 30, Cross Decl., ¶ 3 at Ex.03039-43. Another time, Ryan made sexually inappropriate comments to Cross about her tongue ring. He told other officers who were standing nearby, “Leave her alone, she has a tongue ring. There’s something that I can do with her later.” *Id.*

Ryan has physically searched Mellina Williams on occasions, rather than having a female officer do so, and has repeatedly made comments to her like, “Oh yeah, you looking good today” and “You’ve got a big butt.” Ex. 18, Williams Decl., ¶ 5 at Ex.02984-88. Ryan has also made several sexually inappropriate comments to Nijah Reed. On one occasion he told her, “let me take you out.” On another occasion he said, “you probably have some good stuff” which she thought meant that he wanted to have sex with her. Ryan also requested to smell her hands because he believed that she had placed drugs in her genital area and that her hands smelled like her vagina. Ex. 19, Reed Decl., ¶ 5 at Ex.02989-90. In 2012, while Saquita Nash was detained at the Tenderloin Police Station, several unknown female police officers attempted to conduct a vaginal cavity search of her. She resisted the search. Later, Ryan came into the room where she was being held and screamed at her, “Quit fucking around Ms. Nash!” Ex. 7, Nash Decl., ¶ 4 at Ex.02935-39. “While I continued to be handcuffed, he turned me around and forcibly spread my legs from behind. While another female officer held me down, Ryan attempted to remove a bag of drugs from my vagina. I screamed “help me, help me!” Ryan ultimately extracted the drugs from my vagina, but I felt extremely violated in the process.” Ex. 7, Nash Decl., ¶ 4 at Ex.02935-39.⁴⁸ See also Ex. 20, Adams Decl., ¶ 3 at Ex.02991-95 (noting that Ryan is known in the Tenderloin neighborhood for harassing Blacks and that Ryan made her uncomfortable because he made comments to her that made her feel that he was speaking to her in a sexually

⁴⁸ Nash also heard Ryan make comments that women who are confidential informants for him are “bitches that work for me.” Ex. 7, Nash Decl., ¶ 5 at Ex.02935-39.

1 inappropriate manner.) In another instance, Ryan made inappropriate comments and gestures to
 2 Ebony Wallace while he was on duty. Wallace witnessed Ryan pulling at his crotch while he
 3 said, “Hey girls, get it up there!” Ex. 35, Wallace Decl., ¶ 5 at Ex.03060-65.

4 Ebony Wallace also witnessed Officer Goff flirt with some of her friends while he was
 5 working in the Tenderloin. In 2014, he told Wallace and a few of her female friends, “I saw your
 6 pictures on Instagram and they looked real real nice.” The tone in his voice and the way he
 7 delivered the statement “made us feel uneasy. He seemed to take pleasure in being able to look
 8 at our personal photographs online.” Ex. 35, Wallace Decl., ¶ 4 at Ex.03060-65. Officer Crosby
 9 has also sexually harassed Black females. In 2013, Crosby, dressed in street clothing,
 10 approached Lakeysha White on Sixth Street and said, “I want to handcuff you to a bed and fuck
 11 you.” Ex. 16, White Decl., ¶ 5 at Ex.02974-78. On other occasions, he has referred to her as his
 12 “girlfriend” and told other people to “stop talking to my girl.” *Id.*

13 Inappropriate searches of Black women in the Tenderloin by other male law enforcement
 14 officers are also an issue. This happened to Acacia McNeal on two separate occasions within the
 15 last five years. “On both occasions, the most recent having occurred approximately two years
 16 ago, a male officer searched me, touched my breasts and unclasped my bra. I objected to the
 17 search, but the officer continued.” Ex. 9, McNeal Decl., ¶ 4 at Ex.02942-46. David Madlock
 18 has “witnessed police officers take pleasure in conducting physical searches of their genitals and
 19 buttocks. Some of the officers will show their pleasure by smiling and/or spending an unusually
 20 long time to search this area of the body. On multiple occasions, I’ve witnessed male officers
 21 put their hands inside of a woman’s pants instead of waiting for a female officer to conduct the
 22 search.” Ex. 23, Madlock Decl., ¶ 4 at Ex.03003-07.

23 Latoya Jackson was the victim of an inappropriate search by SFPD Officer Goff. In
 24 2012, Goff performed a probation search of her. “While performing the search, Officer Goff
 25 touched my breasts. His search did not feel like a typical pat-down search that I would receive
 26 from a female officer, it was more like he groped me. Officer Goff told me that he didn’t mean
 27

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1 to do it but I sensed that it was intentional.” Ex. 34, Jackson Decl., ¶ 4 at Ex.03055-59. Jackson
 2 then discovered that Goff had been looking at her photographs on Instagram after he made
 3 comments about her pictures. *Id.* at ¶ 5. Shavon Gibson has been arrested many times in the
 4 Tenderloin and as part of the arrest she is often searched. “One day a male policeman, of Arab
 5 descent, decided he was going to search me rather than wait for a female officer. The man pat
 6 me down very aggressively, patting my behind and reaching around to pat down my crotch
 7 area.” Ex. 31, Gibson Decl., ¶ 6 at Ex.03044-46.

8

9 **3. Acts Of Violence By SFPD Officers In The Tenderloin Against Blacks**

10 Some defendants have witnessed SFPD officers commit acts of violence against Blacks,
 11 or had acts of violence committed against them. *See* Ex. 37, Mackey Decl., ¶ 5 at Ex.03071-72
 12 (“While out in the neighborhood I have seen brutal interactions between the police and African
 13 Americans.”) Officer Hope was particularly rough with Sholanda Adams. “I was just going to
 14 work as an in-home care worker in September 2014. At the time I was pregnant. The officers
 15 detained me, grabbed my arms, and were forceful with me. They also harassed my client, an
 16 African-American gentleman who was at the time using a cane and recovering from a stroke who
 17 had come over to where I was. They pushed him against a car and roughed him up.” Ex. 20,
 18 Adams Decl., ¶ 4 at Ex.02991-95.⁴⁹ In 2014, Ebony Wallace witnessed Officer Goff and two
 19 other SFPD officers driving in the Tenderloin neighborhood in a burgundy/deep cherry Malibu.
 20 “The officers appeared to be playing around while on patrol. They drove around the
 21 neighborhood with their firearms hanging outside the windows of the car. The look on their
 22 faces made it clear that they were having a good time.” This incident made Wallace feel very
 23 unsafe and uneasy. Ex. 35, Wallace Decl., ¶ 6 at Ex.03060-65. Aaron Mathews watched Officer
 24

25 ⁴⁹ *See also* Ex. 33, Declaration of Leonard Amedee, ¶¶ 1-3 at Ex.03053-54 (confirming that he
 26 was walking with Sholanda Adams in the fall of 2014 when SFPD officers “grabbed her out of
 nowhere.”).

27

1 Nocetti place a man in a chokehold until “blood vessels in his eyes appeared to pop, turning
 2 Joe’s eyes red.” Ex. 8, Mathews Decl., ¶¶ 4 at Ex.02940-41. Anita Dixon’s foot was stomped
 3 on by an SFPD officer trying to wake her up. Ex. 11, Dixon Decl., ¶ 4 at Ex.02952-56.

4 William Brown was choked, kicked and punched by officers in the area of Taylor and
 5 Market Streets. Ex. 22, Brown Decl., ¶ 4 at Ex.03001-02. Darrell Powell was hit by five or six
 6 officers in the fall of 2014. Ex. 13, Powell Decl., ¶ 4 at Ex.02962-63. David Madlock has
 7 “witnessed at least thirty separate occasions where the police have beaten or been physically
 8 aggressive towards African-Americans. Some of the beatings occurred even after the person had
 9 been in handcuffs.” Ex. 23, Madlock Decl., ¶ 5 at Ex.03003-07. Tiffany Cross watched Officers
 10 Ryan and Razz run their car into an Black woman who was attempting to avoid arrest. Ex. 30,
 11 Cross Decl., ¶ 4 at Ex.03039-43. Erwin Mackey saw Tenderloin police officers punch a heroin
 12 addict who did not move quickly enough when the police told him to get off the block. Ex. 37,
 13 Mackey Decl., ¶ 5 at Ex.03071-72.

14 In 2013, near the corners of Eddy and Mason Streets in the Tenderloin, Officer Ryan
 15 stopped Tiana Reddic and her girlfriend, Tierra Santalucia:

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17 He suspected that we were in possession of drugs. He and another officer patted
 18 us down. Ryan then made a comment, referring to me, that he was “gonna send
 19 this bitch back to prison where I sent her before.” Ryan then made another
 20 comment to his fellow officer and said, ‘‘Make it easier, how about I just handcuff
 them and put them in the police car and drive them to Candlestick and put a bullet
 in their heads.’’ He further stated, ‘‘next time I see you, I’m going to give you a
 case and send you the fuck back to prison.’’

21 Ex. 21, Reddic Decl., ¶ 4 at Ex.02996-03000.

22 Officer Ryan has also threatened Shavon Gibson. Ryan said he would take Gibson to jail
 23 if she did not leave the area. ‘‘He has also told me that even if I did not have drugs on me he
 24 would plant some on me and then take me to jail.’’ Ex. 31, Gibson Decl., ¶ 5 at Ex.03044-46.
 25 Wendell Johnson likewise had a deeply traumatic experience with Ryan:

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27 In November 2012, Officer Shaughn Ryan passed me while driving his police

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1 vehicle in the Tenderloin neighborhood. Officer Ryan abruptly stopped his
 2 vehicle and exited the car. He drew his gun and pointed it directly at me. He
 3 yelled, "who are you?" I quickly provided him with my name. Officer Ryan
 4 placed me under arrest, handcuffed me and then he escorted me across the street
 5 to a police vehicle. I asked Officer Ryan multiple times why I was being arrested.
 6 He responded, "shut your mouth." I continued to ask him why I was being
 7 arrested. I wanted clarification about what was happening because I had not done
 8 anything wrong. Officer Ryan appeared agitated by my questioning and he
 9 became even more upset when he discovered that I didn't know his name or who
 he was in the neighborhood. For some reason he expected me to know him or at
 least know of him. At this point he began to threaten me. He said, "I'm going to
 kill you mother fucker and shoot you in your head." I was terrified that he was
 going to kill me especially since it was dark and late at night. Two other San
 Francisco police officers were present when he made these statements; I did not
 recognize the other officers and I do not know their names.

10 Ex. 29, Johnson Decl., ¶ 4 at Ex.03034-38.

11 ARGUMENT

12 I. Selective Prosecution

13 A. Legal Standard

15 1. United States v. Armstrong

16 In *United States v. Armstrong*, 517 U.S. 456, 469 (1996), the Supreme Court determined
 17 the standard for selective prosecution claims. Noting that the "requirements for a selective
 18 prosecution claim draw on ordinary equal protection standards," the Court held that a claimant
 19 "must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it
 20 was motivated by a discriminatory purpose." *Id.* at 465 (internal citations omitted).

21 In order to obtain discovery, the defense must produce "some evidence tending to show
 22 the existence of the discriminatory effect element." *Id.* at 469. Notably, the Supreme Court
 23 never stated that a defendant needs to produce "some evidence" of the discriminatory intent
 24 element to obtain discovery of a selective prosecution claim. *See id.*⁵⁰ To show "some

25 ⁵⁰ Despite this, some courts have held that a defendant needs to produce "some evidence" of both
 26 discriminatory effect and discriminatory intent to receive discovery on selective prosecution.
 27 *See United States v. Venable*, 666 F.3d 893, 900 (4th Cir. 2012); *United States v. Lewis*, 517 F.3d

1 evidence” of the discriminatory effect prong, the defense must “produce some evidence that
 2 similarly situated defendants of other races could have been prosecuted, but were not.” *Id.* This
 3 “rigorous standard,” the Supreme Court concluded, “adequately balances the Government’s
 4 interest in vigorous prosecution and the defendant’s interest in avoiding selective prosecution.”
 5 *Id.* at 470.

6 Applying the standard to the case before it, the Supreme Court found that the proffered
 7 evidence failed to pass the necessary threshold. The study proffered by the Federal Public
 8 Defender’s office in that case — which indicated that every one of the twenty-four cocaine cases
 9 closed by the office in 1991 involved defendants who were Black — “failed to identify
 10 individuals who were not black and could have been prosecuted for the offenses for which
 11 respondents were charged, but were not so prosecuted.” *Id.* The Court also found that a
 12 proffered newspaper article, “which discussed the discriminatory effect of federal drug
 13 sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute.”
 14 *Id.* Finally, the Court explained that affidavits, “which recounted one attorney’s conversation
 15 with a drug treatment center employee and the experience of another attorney defending drug
 16 prosecutions in state court, recounted hearsay and reported personal conclusions based on
 17 anecdotal evidence.” *Id.*

18 Overall, the *Armstrong* court made clear that the main failure of the defense was in not
 19 identifying similarly-situated persons of other races who could have been prosecuted but were
 20 not. *Id.* at 470. Relatedly, *Armstrong* explained that the defense could have met its burden by
 21 identifying members of other races who were charged in state court for the crime at issue in the
 22 selective enforcement litigation, but not charged federally. *Id.* at 470. In fact, in its reply brief in
 23 the *Armstrong* case, the Solicitor General argued that the defendants had failed to avail

24 20, 25 (1st Cir. 2008); *United States v. Sepulveda*, 952 F.Supp.94, 96 (D.R.I. 1997); *United*

25 States v. Olvis, 97 F.3d 739, 743 (4th Cir.1996). Other cases have required only “some

26 evidence” of discriminatory effect. *United States v. Al Jibori*, 90 F.3d 22, 25 (2d Cir. 1996);
United States v. Paxton, 2014 WL 1648746 (N.D. Ill., Apr. 17, 2014).

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1 themselves of California state court records that were open to inspection and could provide
2 supporting data. *See United States v. Armstrong*, No. 95-157, 1996 WL 67650, at *16–17
3 (U.S.Reply.Brief, filed Feb. 15, 1996). Despite this, case law subsequent to *Armstrong* shows
4 that when *Armstrong* motions are meritorious, it is often because lower courts have ordered the
5 government to provide discovery even when the defense has not identified similarly-situated
6 individuals of other races. *See United States v. Davis*, 766 F.3d 722, 731 (7th Cir. 2014), *rev'd*
7 and remanded *en banc*, 793 F.3d 712 (7th Cir. 2015) (discussing the stash-house cases in the
8 Northern District of Illinois in which numerous district courts granted discovery based on
9 statistics); *United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999); *United States v. Al Jibori*, 90
10 F.3d 22, 25–26 (2d Cir. 1996).

2. Discriminatory Effect Prong Of A Selective Prosecution Claim

13 “To establish a discriminatory effect in a race case, the claimant must show that similarly
14 situated individuals of a different race were not prosecuted.” *Armstrong*, 517 U.S. at 465.
15 Courts have held that the discriminatory effect prong may be shown by statistical evidence.
16 *Chavez v. Illinois State Police*, 251 F.3d 612, 638 (7th Cir. 2011); *Davis*, 766 F.3d at 731
17 (discussing the stash-house cases in the Northern District of Illinois in which numerous district
18 courts granted discovery based on statistics); *Tuitt*, 68 F. Supp. 2d 4; *United States v. Duque-*
19 *Nava*, 315 F.Supp.2d 1144, 1156 (D. Kan. 2004) (“While helpful, purely statistical evidence is
20 rarely sufficient to support an equal protection claim, but can be sufficient to establish
21 discriminatory effect.”) *Cf. United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997) (noting
22 that the statistics in *Armstrong* did not “advance a defense of selective prosecution without
23 further consideration of the sociological factors affecting the pattern of crime and without a
24 showing that similarly-situated defendants of other races had been left unprosecuted”).

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), for example, discriminatory effect was proved by showing that all 200 applications by Chinese launderers were denied, while only 1 of

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1 90 applications by White launderers was denied. Similarly, in *Hunter v. Underwood*, 417 U.S.
 2 222, 228 (1985), the Supreme Court was satisfied with a showing that the law at issue made
 3 disenfranchisement of Blacks at least 1.7 times more likely than disenfranchisement of Whites.
 4 In using statistics, the defense must not assume that members of a particular racial group
 5 commits crimes at a rate proportionate to their representation in the overall population. *United*
 6 *States v. Arenas-Ortiz*, 339 F.3d 1066, 1069 (9th Cir. 2003) (citing *Armstrong*, 517 U.S. at 469-
 7 70.)

8

9

a. Definition of Similarly Situated

10 The Supreme Court did not define “similarly situated” in *Armstrong*, nor in any case
 11 since. In *Turner*, the Ninth Circuit did not provide an overall definition of similarly-situated but
 12 did hold that the statistics presented by the defense were unimpressive because there was “no
 13 showing at all that the crack cocaine sellers prosecuted by California were gang members who
 14 sold large quantities of crack; so the principal characteristic of the federal defendants is omitted.”
 15 *Turner*, 104 F.3d at 1185.⁵¹ In so holding, the Ninth Circuit explained “that such gangs should
 16 be targeted is a neutral, nonracial law enforcement decision; the distribution of cocaine by gang
 17 members inclined to violence makes the distribution more heinous and more dangerous than the

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⁵¹ In a case decided before *Armstrong*, *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989), superseded by statute on other grounds, P.L. No. 99-603, 100 Stat. 3359, as stated in *United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002). The Ninth Circuit stated that:

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The goal of identifying a similarly situated class of law breakers is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group. The control group and defendant are the same in all relevant respects, except that defendant was, for instance, exercising his first amendment rights. If all other things are equal, the prosecution of only those persons exercising their constitutional rights gives rise to an inference of discrimination. But where the comparison group has less in common with defendant, then factors other than the protected expression may very well play a part in the prosecution.

1 single sale of cocaine by individuals.”⁵² *Cf. Tuitt*, 68 F.Supp.2d at 14 (noting that the
 2 government was defining “similarly situated” too narrowly as “similarly situated” does not mean
 3 “identically situated”). Other Circuits have defined “similarly situated” as follows.

4

5 **i. First Circuit**

6 The First Circuit defines similarly situated as: “A similarly situated offender is one
 7 outside the protected class who has committed roughly the same crime under roughly the same
 8 circumstances but against whom the law has not been enforced.” *United States v. Lewis*, 517
 9 F.3d 20, 25 (1st Cir. 2008). The First Circuit also explained that:

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11 In configuring the pool of similarly situated offenders, ‘no fact should be omitted
 12 to make it out completely.’ To be sure, this statement cannot be taken literally.
 13 The focus of an inquiring court must be on factors that are at least arguably
 14 material to the decision as to whether or not to prosecute. Material prosecutorial
 15 factors are those that are relevant—that is, that have some meaningful relationship
 16 either to the charges at issue or to the accused—and that might be considered by a
 17 reasonable prosecutor. Unrelated, irrelevant, or trivial factors cannot meet the
 18 materiality requirement and, therefore, cannot be built into the configuration of
 19 the pool.

20

21 *Id.* (citing *Armstrong*, 517 U.S. at 466).

22

23 **ii. Fourth Circuit**

24 The Fourth Circuit defines similarly situated as: “Defendants are similarly situated when
 25 their circumstances present no distinguishable legitimate prosecutorial factors that might justify
 26 making different prosecutorial decisions with respect to them.” *Olvis*, 97 F.3d at 744. *Cf.*
 27 *Chavez*, 251 F.3d at 636 (“The relevant inquiry is whether a similarly situated individual was
 28 treated differently than the plaintiff, not whether one white motorist was subjected to the same

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30 ⁵² All of the cases in Operation Safe School concern the single sale of a controlled substance by
 31 an individual. Notice of Related Case at 5, *United States v. Tiana Reddic*, No. 15cr52 (N.D. Cal.
 32 filed Mar. 31, 2015) (Docket No. 16-2).

33

unlawful treatment. Allowing defendants to escape liability for discriminating against Hispanics simply because they occasionally mistreat white motorists would dismantle our equal protection jurisprudence.”).

The Fourth Circuit also identified the following factors as relevant to the issue of whether someone is similarly situated: (1) a prosecutor’s decision to offer immunity to an equally culpable defendant because that defendant may choose to cooperate and expose more criminal activity; (2) the strength of the evidence against a particular defendant; (3) the defendant’s role in the crime; (4) whether the defendant is being prosecuted by state authorities; (5) the defendant’s candor and willingness to plead guilty; (6) the amount of resources required to convict a defendant; (7) the extent of prosecutorial resources; (8) the potential impact of a prosecution on related investigations and prosecutions; and (9) prosecutorial priorities for addressing specific types of illegal conduct.” *Olvis*, 97 F.3d at 744. The 6th through 9th factors relate to whether the same law enforcement officers were involved. *See Venable*, 666 F.3d at 902 (noting that factors 6-9 are “are all affected by Project Exile’s role in this case,” and that “it bears note that in order to prosecute Turner and Zechman, the United States Attorney’s Office for the Eastern District of Virginia would have had to reach outside the Project Exile referral process, outside the geographic reach of Project Exile, and outside its own district”).

iii. Seventh Circuit

Under Seventh Circuit law, the “similarly situated” comparison group is defined by the government’s purported selection criteria. In *United States v. Hayes*, 236 F.3d 891 (7th Cir. 2001), for example, the court focused on comparing “African-Americans falling within the Operation Triggerlock guidelines [who] were prosecuted in federal court” to “persons of another race who fell within the Operation Triggerlock guidelines and were not federally prosecuted.” *Id.* at 895–896 (7th Cir. 2001); see also *Chavez*, 251 F.3d at 640-45 (defining similarly situated comparison group as white drivers on Illinois highways who met the requirements of law

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1 enforcement's "Operation Valkyrie").

2
3 **iv. Eleventh Circuit**

4 The Eleventh Circuit defines similarly situated as:

5 In light of those legitimate factors, we define a "similarly situated" person for
6 selective prosecution purposes as one who engaged in the same type of conduct,
7 which means that the comparator committed the same basic crime in substantially
8 the same manner as the defendant—so that any prosecution of that individual
9 would have the same deterrence value and would be related in the same way to
the Government's enforcement priorities and enforcement plan—and against
whom the evidence was as strong or stronger than that against the defendant.

10 *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000).

11 In addressing "similarly situated," the Eleventh Circuit also noted that though the
12 Supreme Court has not "definitively explained what constitutes a 'similarly situated' individual
13 in this context, [] the definition is informed by the Supreme Court's recognition of legitimate
14 factors that may motivate a prosecutor's decision to bring a case against a particular defendant.
15 Those factors include 'the strength of the case, the prosecution's general deterrence value, the
16 Government's enforcement priorities, and the case's relationship to the Government's overall
17 enforcement plan.'" *Id.* at 810 (citing *Armstrong*, 517 U.S. at 465). Finally, the Eleventh Circuit
18 explained that the "government can legitimately place a higher priority on prosecuting someone
19 who commits an offense three, six or seven times, than someone who commits an offense once
20 or twice, especially when the offense is a non-violent one. Likewise, the willingness of a jury to
convict a defendant of a crime may increase with the number of times that defendant has
21 committed the crime." *Id.* at 812.

22
23 b. The Defendants Have Made A Prima Facie Showing Of
Discriminatory Effect

24
25 As an initial matter, this Court need not select a specific definition of a "similarly
26 situated" individual because, under any definition used by any court, the defense has identified
27

1 numerous similarly situated individuals who could have been charged in Operation Safe Schools
 2 but were not. Indeed, the evidence of Operation Safe Schools' discriminatory effect is
 3 overwhelming.

4 First, the expert report prepared by Dr. Beckett compellingly demonstrates that the racial
 5 composition of persons charged with drug-trafficking under Operation Safe Schools (100%
 6 Black) is significantly at odds with both (a) the racial composition of Tenderloin-based drug-
 7 traffickers arrested and charged in San Francisco County Superior Court; and (b) the racial
 8 composition of drug providers in the Tenderloin as described by drug users in the Tenderloin.
 9 See Ex. 41, Amram Disco. Mtn. Decl., Att. M. As Dr. Beckett found, during the relevant time
 10 period, 61.4% of those arrested in the Tenderloin and charged with drug-trafficking crimes in
 11 Superior Court were Black, while 24.7% were Latino and 10.7% were White. *Id.* at Ex.04218-
 12 20. According to Dr. Beckett, when compared to the 100% Black arrest/charging rate of
 13 Operation Safe Schools, the difference in these racial proportions is "highly statistically
 14 significant, and there is virtually no chance that this difference is the result of chance."⁵³ *Id.* at
 15 Ex.04219-20. A comparison between Operation Safe Schools and Dr. Beckett's study of the
 16 racial composition of drug providers in the Tenderloin (56% Black, 20% Latino, 16.8% White)
 17 leads to the same conclusion. *Id.* at Ex.04220.

18 Next, almost every area of the Tenderloin falls within 1,000 feet of a playground or
 19 educational institution covered by 21 U.S.C. § 860, the statute under which the Operation Safe
 20 Schools defendants were prosecuted.⁵⁴ See Ex.6, Sommerfeld Disco. Mtn. Decl. ¶ 10 & Att. D;

21 ⁵³ In addition to the CMS data, the defense has identified more than fifty non-Black drug
 22 traffickers who were arrested in the Tenderloin between August-December 2013 and August-
 23 December 2014, but were not charged in either state or federal court. See Ex. 1, Koeninger
 24 Disco. Mtn. Decl., Att. A-B; cf. *id.* Att. G. There is good reason to believe that additional public
 25 records requests would reveal even more such arrests. See n.16 *supra*.

26 ⁵⁴ As noted above, the Operation Safe Schools defendants were indicted under various provisions
 27 of § 860. While many were indicted for activity within 1,000 feet of a school, one defendant
 28 (Lakeysha White) was charged with drug-trafficking within 1,000 feet of a playground, while
 another (William Brown) was charged with drug-trafficking within 1,000 feet of the Downtown
 Campus of San Francisco State University.

1 Ex. 38, Declaration of Loana Dominguez in Support of Motion to Compel Discovery on
 2 Selective Prosecution and Enforcement ¶¶ 2-4 at Ex.03073-75. Accordingly, of the hundreds of
 3 drug-trafficking arrests that were made in the Tenderloin between January 2013 and February
 4 2015 and involved non-Black individuals, almost *all* could have been charged under § 860.⁵⁵
 5 See Ex. 1, Koeninger Disco. Mtn. Decl., Atts. B & G (listing hundreds of non-Black drug-
 6 trafficking arrests in the Tenderloin); *id.*, Att. A (incident reports underlying various Tenderloin
 7 arrests of non-Black drug-traffickers). In fact, in multiple instances involving similarly situated,
 8 non-Black drug-traffickers, the SFPD officers were actually investigating whether a particular
 9 drug transaction occurred less than 1,000 feet from a school. *See* discussion *supra* at Section V.

10 Finally, the defense has specifically identified numerous non-Black individuals who were
 11 trafficking the same types of drugs as the Operation Safe Schools defendants, during the same or
 12 similar time period as the Operation Safe Schools defendants, and whose criminal histories are
 13 the same or similar to the Operation Safe Schools defendants (some of whom have **no** adult
 14 convictions, **one** misdemeanor, non-drug-related adult conviction, or only **one** drug-trafficking
 15 conviction). *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. A-D, F-G.⁵⁶ Further, many of these
 16 non-Black individuals identified by the defense would constitute “recidivists” or “repeat
 17 offenders” under nearly any definition the government could possibly seek to employ. Because
 18 numerous examples of these similarly situated non-Black, Tenderloin-based drug-traffickers are
 19 discussed in detail in the Background Section V *supra*, the defense will not revisit those facts
 20 again here. However, the defense emphasizes that those non-Black, Tenderloin-based drug-
 21 traffickers include people who: were arrested while on parole or felony probation for previous

22⁵⁵ The defense has identified two non-Black individuals charged in Superior Court whose arrests
 23 appear to fall more than 1,000-feet from a covered playground or educational institution. *See* Ex.
 24 1, Koeninger Disco. Mtn. Decl., Att. G at Ex.02212 (██████████ arrest at Mission and Julia
 25 Streets); *id.* at Ex.02220 ██████████ arrest at 8th and Minna Streets).

26⁵⁶ By identifying these individuals, the defense does not concede that someone must meet all of
 27 these criteria to qualify as similarly situated. In fact, the defense believes that such a ruling
 28 would define similarly-situated too narrowly. However, given the volume of “similarly situated”
 persons identified by the defense, the Court need not decide the precise contours of that phrase.

1 drug-trafficking convictions; otherwise had previous drug-trafficking convictions or charges; had
 2 been repeatedly arrested by SFPD for drug trafficking in the Tenderloin; had open drug-
 3 trafficking cases in S.F. Superior Court; or were otherwise well-known to SFPD as notorious
 4 drug traffickers, some of whom could be found in the Tenderloin almost every day. Moreover,
 5 because some of the defendants targeted by Operation Safe Schools had little-to-no adult
 6 criminal history, *see* Background section I.G *supra*, the defense contends that every non-Black
 7 individual who was arrested for trafficking drugs in the Tenderloin during the relevant time
 8 period constitutes a person similarly situated to the Operation Safe Schools defendants. *See* Ex.
 9 1, Koeninger Disco. Mtn. Decl. Atts. A-D, F-G.

10 In view of the foregoing, the discriminatory effect of Operation Safe Schools is beyond
 11 cavil.

12 **3. Discriminatory Intent Prong Of A Selective Prosecution Claim**

13 Because “[p]roving the motivation behind official action is often a problematic
 14 undertaking,” *Hunter v. Underwood*, 471 U.S. 222 (1995), “[d]etermining whether official action
 15 was motivated by intentional discrimination ‘demands a sensitive inquiry into such
 16 circumstantial and direct evidence of intent as may be available.’” *Farm Labor Organizing*
 17 *Committee v. Ohio State Highway Patrol*, 308 F.3d 523, 534 (6th Cir. 2003) (citing *Village of*
 18 *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *United States v.*
 19 *Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) (“Discriminatory intent can be shown
 20 by either direct or circumstantial evidence.”). Courts often look to the use of racially derogatory
 21 language. “Such language is strong evidence of racial animus, an essential element of any equal
 22 protection claim.” *Chavez*, 251 F.3d at 646. *See also Carrasca v. Pomeroy*, 313 F.3d 828, 834
 23 (3d Cir. 2002) (reference to Plaintiffs as “Mexicans,” arguably stated as a pejorative racial slur,
 24 demonstrates that the Rangers acted with a racially discriminatory purpose).

25 Moreover, courts must take into account whether the selection criteria used by the

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1 government was subject to abuse or otherwise not neutral. *Wayte v. United States*, 470 U.S. 598,
 2 626 (1985). *See also id.* at 629 (“Adherence to a particular policy or practice, with full
 3 knowledge of the predictable effects of such adherence ... is one factor among others which may
 4 be considered by a court in determining whether a decision was based on an impermissible
 5 ground.”) (internal citations omitted). The Seventh Circuit has explained that a defendant can
 6 satisfy the discriminatory intent prong by coming forward with evidence showing that the
 7 government had an “actual or de facto” policy “encouraging racial profiling.” *United States v.*
 8 *Barlow*, 310 F.3d 1007, 1012 (7th Cir. 2002). And the conduct of police officers, including their
 9 awareness of a defendant’s race before arrest, is relevant. *See Duque-Nava*, 315 F.Supp.2d at
 10 1161 (finding no discriminatory intent where there was no evidence the officer had treated,
 11 spoke to, or otherwise exhibited discriminatory behavior and where there was no evidence the
 12 officer knew the defendant’s race before the stop); *Marshall v. Columbia Lea Regional Hospital*,
 13 345 F.3d 1157, 1168 (10th Cir. 2003) (“Similarly, a police officer’s pattern of traffic stops and
 14 arrests, his questions and statements to the person involved, and other relevant circumstances
 15 may support an inference of discriminatory purpose in this context”).

16 Some courts find that statistics, if compelling, provide sufficient evidence of intent, and
 17 thus the discriminatory intent prong often overlaps with discriminatory effect. *United States v.*
 18 *Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) (“Such purpose may, however, be demonstrated
 19 through circumstantial or statistical evidence.”); *United States v. Paxton*, No. 13 CR 103, 2014
 20 WL 1648746, at *5 (N.D. Ill. Apr. 17, 2014) (finding that statistical data on the races of
 21 defendants charged in phony-stash cases in the Northern District of Illinois was sufficient to
 22 show both discriminatory effect and intent); *Smith*, 231 F.3d at 810 (“We recognize that the
 23 nature of the two prongs of a selective prosecution showing are such that they will often overlap
 24 to some extent....”); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n. 20 (1977)
 25 (“Statistics showing racial or ethnic imbalance are probative ... because such imbalance is often a
 26 telltale sign of purposeful discrimination.”); *Tuitt*, 68 F.Supp.2d at 10 (citing *Gomillion v.*
 27

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1 *Lightfoot*, 364 U.S. 339, (1960) (“A discriminatory effect which is severe enough can provide
 2 sufficient evidence of discriminatory purpose.”). *See also Washington v. Davis*, 426 U.S. 229,
 3 242 (1976) (“[A]n invidious discriminatory purpose may often be inferred from the totality of the
 4 relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race
 5 than another.”). This is especially true in cases involving the “inexorable zero.” *See United*
 6 *States v. Paxton*, No. 13 CR 103, 2014 WL 1648746, at *5 (finding that defendants had
 7 presented evidence of discriminatory effect and intent where “[t]he defense has demonstrated
 8 that no white defendants have been indicted for phony stash house cases since 2009, despite the
 9 diverse makeup of the Northern District of Illinois. Because ‘the inexorable zero’ may be
 10 evidence of discriminatory intent, *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886), the court
 11 finds that defendants have produced ‘some evidence’ tending to show discriminatory intent.”).

12 In fact, in the oral argument for *Armstrong*, the Solicitor General conceded that a large
 13 enough statistical disparity between the race of those charged in state court with those charged in
 14 federal court would itself be sufficient to warrant a response from the government. *United States*
 15 *v. Armstrong*, No. 950157, 1996 WL 88550, at *7 (Oral.Arg.Trans., Feb. 26, 1996).
 16 Specifically, Justice Stevens questioned the Solicitor General as to whether discovery would be
 17 warranted if the state court files showed that 50 percent of the prosecutions were of Blacks
 18 whereas 100 percent of the federal prosecutions were of Blacks. *United States v. Armstrong*,
 19 1996 WL 88550, at *3 (U.S.Oral.Arg.1996). After some back and forth, Justice Ginsburg
 20 returned to the question originally posed by Justice Stevens; the Solicitor General responded as
 21 follows: “Well, I think that the example that Justice Stevens gave, and you gave, would be going
 22 a very long way toward showing that there was a selection. There would be people similarly
 23 situated. At least presumably that would require the Government to say something in response to
 24 that, but we certainly don’t have that in this case.... We think in a situation such as you describe
 25 the Government would have a responsibility to come forward and show, in some fashion or
 26 another, that there was an absence of comparability....” *Id.* at *7.
 27

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1 Other courts have also found statistics sufficient. In *Tuitt*, for example, the court found
 2 the defense made a sufficient showing to obtain discovery based only on the statistical disparity
 3 between the race of defendants charged in federal court with selling crack cocaine (all Black)
 4 and those charged in state court (57% Black). In so holding, the court noted that the “evidence
 5 more than speaks for itself,” that even the government acknowledged “that the evidence could
 6 ‘raise an eyebrow,’” and that “more importantly, the information provided by Defendant, unlike
 7 that provided in *Armstrong*, is not anecdotal or confined to statistics arising out of the federal
 8 district itself. Rather, Defendant has also undertaken a comprehensive survey of the local state
 9 courts in order to provide an appropriate comparison.” *Tuitt*, 68 F.Supp.2d at 9.

10 In contrast, in *Olvis*, the Fourth Circuit held that the defendant’s statistics did not provide
 11 “some evidence” of discriminatory intent because “the study provide[d] no statistical evidence
 12 on the number of blacks who were actually committing crack cocaine offenses or whether a
 13 greater percentage of whites could have been prosecuted for such crimes.” *Olvis*, 97 F.3d at 745.
 14 “Without an appropriate basis for comparison, the percentage of African American crack cocaine
 15 defendants proved nothing, unless it could be presumed that crack cocaine violations were
 16 committed proportionately by all races, an assumption rejected by the Supreme Court in
 17 *Armstrong*.” *Venable*, 666 F.3d at 903. *See also id.* (finding insufficient evidence of
 18 discriminatory intent because the statistical evidence provided “contains no appropriate basis for
 19 comparison. It provides no statistical evidence about the number of blacks who were actually
 20 committing firearms offenses or whether a greater percentage of whites could have been
 21 prosecuted for such crimes. It does not even provide any evidence regarding the proportion of
 22 blacks residing within the relevant geographical area”).

23 In *Marshall*, the Tenth Circuit approved the use of statistics because:

24
 25 In general, the absence of an overtly discriminatory policy or of direct evidence
 26 of police motivation results in most claims being based on statistical comparisons
 27 between the number of black or other minority Americans stopped or arrested and
 their percentage in some measure of the relevant population. This requires a

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1 reliable measure of the demographics of the relevant population, a means of
 2 telling whether the data represent similarly situated individuals, and a point of
 3 comparison to the actual incidence of crime among different racial or ethnic
 4 segments of the population.

5 345 F.3d at 1168 (citing *Armstrong*, 517 U.S. at 469-70).

6 a. The Defense Has Shown A Prima Facie Case Of Discriminatory
 7 Intent

8 The statistical disparity present here is so dramatic that it alone should suffice for making
 9 a prima facie case of discriminatory intent based on the cases cited above. However, the Court
 10 need not decide whether statistics alone are sufficient because there are at least two other bases
 11 supporting a prima facie case of discriminatory intent. They are:

- 12 • A comparative analysis of the thirty-seven Operation Safe Schools defendants
 13 with the similarly-situated persons shows that the government's race neutral
 14 reasons for prosecuting the thirty-seven Operation Safe Schools defendants,
 15 outlined in their declarations filed in July 2015, are pretextual. *See Batson v.*
Kentucky, 476 U.S. 79 (1986); *Crittenden v. Ayers*, 624 F.3d 943, 956 (9th Cir.
 16 2010). ("Comparative juror analysis is an established tool at step three of the
 17 Batson analysis for determining whether facially race-neutral reasons are a pretext
 18 for discrimination ... comparative juror analysis may be employed at step one to
 19 determine whether the petitioner has established a prima facie case of
 20 discrimination.").
- 21 • The government put in place a policy for charging decisions for Operations Safe
 22 Schools that was subject to abuse. *Casteneda v. Partida*, 430 U.S. 482, 494
 23 (1977) (stating a "procedure that is susceptible to abuse or is not racially neutral
 24 supports the presumption of discrimination raised by the statistical showing").

25 i. **Comparative analysis.**

26 The government has stated that, in implementing Operation Safe Schools, it directed law
 27 enforcement to "target recidivist, repeat offenders who were selling drugs near schools and to
 28 concentrate on the criminal history of the defendants." Mtn. Seeking Ruling at 6:20-22. The
 government also said that "the decision to charge each defendant in Operation Safe Schools was

1 based on the nature and number of the defendant's prior offenses, the proximity of the
 2 defendant's drug sales to a school, the number of times each defendant sold drugs in and around
 3 the Tenderloin, and the strength of the evidence against each defendant." Mtn. Seeking Ruling at
 4 7:8-11. However, a critical review of these stated directives shows that they are invalid (and,
 5 therefore, pretextual) – both because the thirty-seven defendants charged in Operation Safe
 6 Schools include individuals who do *not* meet the stated criteria, and because the various non-
 7 Black, Tenderloin-based drug traffickers identified above were not charged even though they *do*
 8 meet the government's stated criteria.

9 When evaluating Equal Protection Clause claims in the context of a prosecutor's decision
 10 to strike a prospective juror – *i.e.*, that a prosecutor struck a juror on account of their race – both
 11 the Supreme Court and the Ninth Circuit have consistently endorsed a comparative analysis to
 12 evaluate whether a prosecutor's facially race-neutral explanation for his or her actions actually
 13 amounted to pretext, and therefore, evidence supporting a finding of purposeful discrimination.
 14 See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("More powerful than these bare
 15 statistics, however, are side-by-side comparisons of some black venire panelists who were struck
 16 and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black
 17 panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is
 18 evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.");
 19 *Crittenden v. Chappell*, 804 F.3d 998, 1012 (9th Cir. 2015) (observing that "[c]omparative juror
 20 analysis is an established tool at step three of the *Batson* analysis for determining whether
 21 facially race-neutral reasons are a pretext for discrimination" and concluding that because non-
 22 Black jurors who were "comparable in their death penalty views and otherwise" to a stricken
 23 Black juror "were selected for the jury, the comparative juror analysis significantly weakens the
 24 government's race-neutral explanation" for the prosecutor's challenge and constitutes "strong
 25 evidence in support" of a finding that the challenge "was substantially motivated by race").⁵⁷

26 ⁵⁷ In *Armstrong*, respondents argued that *Batson* cut against any absolute requirement that
 27

1 The comparative analysis employed by courts to evaluate *Batson*-type claims under the Equal
2 Protection Clause is instructive in the context of selective-prosecution-based equal protection
3 claims, and such a comparative analysis finds ready application here. Indeed, when subjected to
4 comparative analysis, the government’s claim that Operation Safe Schools targeted “persistent,
5 recidivist, and repeat offenders selling drugs near schools in the Tenderloin neighborhood of San
6 Francisco,” Gov’t Mtn. Seeking Ruling at 7:10-11, appears to be pretextual.

(a) Recidivism

The government’s assertion that Operation Safe Schools targeted “persistent, recidivist, and repeat offenders” does not withstand scrutiny under a comparative analysis of all of the thirty-seven Black defendants charged under the Operation. As discussed *supra* at Background Section I.G, the criminal history of the thirty-seven defendants varied significantly. In fact, not all of them were “persistent, recidivist, and repeat offenders.” Rather, Jahnai Carter has no adult criminal convictions; Darlene Rouse has one adult conviction (for misdemeanor petty theft); William Brown and Ashley Pharr have only one prior drug-trafficking conviction (from another county); Matthew Mumphrey has only one prior drug-trafficking conviction, but it is thirteen years old, and his only other conviction is an eight-year-old drug paraphernalia conviction; Darrell Powell has no criminal history of drug trafficking; Jamella Jules falls within Criminal History Category (CHC) II of the U.S. Sentencing Guidelines, with only one prior drug trafficking conviction from 2002; Shavon Gibson is CHC I, with only one prior conviction of any kind, a drug-trafficking conviction from 2005; and Shaneka Clay is CHC II based on one

defendants must show that similarly-situated people were not prosecuted. *Armstrong*, 517 U.S. at 467. The Supreme Court held that *Batson* did not do away with the similarly-situated requirement. That does not mean, however, that *Batson* is not instructive on the issue of whether a prosecutor's facially race-neutral explanation for a particular decision is a pretext for discrimination. The Supreme Court has not addressed whether a comparative-juror-analysis framework is applicable in the context of a selective prosecution claim when a defendant has presented evidence of similarly situated people (as opposed to using comparative juror analysis alone to avoid a showing of similarly-situated individuals).

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1 prior drug-trafficking conviction from 2002 (a 1998 conviction was too old to count). Ex. 41,
 2 Amram Disco. Mtn. Decl., ¶¶ 2-4, Att. A at Ex.03094-04144; Ex. 2, Ultan Disco. Mtn. Decl., ¶
 3 2, Att. A at Ex.02234-43.

4 While it may be true that other defendants charged under Operation Safe Schools could
 5 fairly be described as “persistent, recidivist, and repeat offenders,” the fact that the government
 6 nevertheless charged individuals who do not fairly meet these criteria “significantly weakens the
 7 government’s race-neutral explanation” for why all of the thirty-seven defendants it charged
 8 under Operation Safe Schools are Black. *Crittenden*, 804 F.3d at 1017.

9 Moreover, many of the non-Black, Tenderloin-based drug traffickers identified by the
 10 defense could fairly be characterized as “persistent, recidivist, and repeat offenders” who were
 11 similarly trafficking drugs in the Tenderloin. *See discussion supra*. That none of these non-
 12 Black drug-traffickers were prosecuted under Operation Safe Schools tends to undermine the
 13 government’s assertion that recidivism was a “priority” for deciding whom to prosecute. Indeed,
 14 although the declarations submitted by the government assert that the DEA and SFPD were
 15 instructed to target “persistent, recidivist, and repeat offenders selling drugs near schools in the
 16 Tenderloin neighborhood of San Francisco,” see [Barry Decl. ¶ 7, Docket 51-3; Kelaba Decl. ¶
 17 6, Docket 51-4], and also assert (in various forms) that race was not considered during the
 18 determination of which individuals to prosecute under Operation Safe Schools, it appears that
 19 none of the AUSAs who submitted declarations were willing to state unequivocally that only
 20 Black individuals were arrested and presented for prosecution by the DEA and/or SFPD. In
 21 other words, none of the government’s declarations deny that non-Black drug-traffickers were
 22 arrested by the DEA/SFPD and presented for federal prosecution under Operation Safe Schools –
 23 but nevertheless were not prosecuted because they did not satisfy the Operation’s priorities.

24
 25 (b) Trafficking Drugs Near “Schools”

26 The government also asserts that Operation Safe Schools targeted repeat offenders
 27

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1 “selling drugs near *schools* in the Tenderloin neighborhood of San Francisco.” Gov’t Mtn.
 2 Seeking Ruling at 7:10-11 (emphasis added). Although this would constitute a race-neutral basis
 3 for prosecution, a comparative analysis also undermines this assertion and suggests that it is
 4 pretextual. Significantly, while the Operation purportedly targeted persons selling drugs “near
 5 schools” in the Tenderloin, and even though a press-release from the USAO stated that a goal of
 6 Operation Safe Schools was “to ensure that *children* who live and go to school in these
 7 neighborhoods are not exposed to crime and drug dealing,”⁵⁸ the government nonetheless
 8 indicted one of the Operation Safe Schools defendants – William Brown – for trafficking crack
 9 cocaine within 1,000 feet of “the Downtown Campus of San Francisco State University.”
 10 Indictment, *United States v. Brown*, Case No. CR-15-00069 (Docket 1). Therefore, when
 11 indicting Mr. Brown, the government did not adhere to own stated bases for prosecution (and the
 12 defense is unaware of any instance in which the government has claimed that one of the goals of
 13 Operation Safe Schools was to protect adult students studying at local colleges).⁵⁹ Accordingly,
 14 because a comparative analysis shows that not all Operation Safe Schools defendants were
 15 charged consistent with the government’s claimed bases for prosecution, this fact “significantly
 16 weakens the government’s race-neutral explanation” for why all of the thirty-seven defendants it
 17 charged under Operation Safe Schools are/were Black. *Crittenden*, 804 F.3d at 1017.

18 The defense also has demonstrated that nearly all of the non-Black drug traffickers
 19 arrested in the Tenderloin and charged in Superior Court during the relevant period were also
 20 with 1,000 feet of an educational institution or playground covered by 21 U.S.C. § 860. *See Ex.*
 21

22 ⁵⁸ See Phillips Decl. In Support Of Notice Of Related Case (“Phillips Related Case Decl.”), Att.
 23 C [2.12.15 USAO Press Release], United States v. Crystal Anthony, No. 15cr005 (N.D. Cal.
 filed 03/31/15) [Docket No. 11].

24 ⁵⁹ Lakeysha White was indicted for trafficking drugs within 1,000 feet of a playground rather
 25 than a school. *See* Indictment, *United States v. White*, Case No. CR-15-00029 (Docket 1).
 26 Although the defense acknowledges that Ms. White’s indictment is somewhat more consistent
 27 with the government’s stated goal of targeting those persons selling drugs near schools (because
 28 children play at playgrounds), this additional lack of symmetry among Operation Schools
 defendants further supports an inference that this basis for prosecution was pretextual.

1 6, Sommerfeld Disco. Mtn. Decl. ¶ 10 & Att. D at Ex.02931. When the arrest locations for these
 2 non-Black individuals is compared with the locations of the incidents underlying the charges
 3 against the thirty-seven Operation Safe Schools Defendants, *cf.* Ex. 6, Sommerfeld Disco. Mtn.
 4 Decl. ¶ 9 & Att. C at Ex.02926-30 *with* Ex. 6, Sommerfeld Disco. Mtn. Decl., Atts. E & F at
 5 Ex.02932-34, it is plain that the two groups were extensively intermingled. Notwithstanding this
 6 comparative similarity, not one non-Black individual was charged federally – a fact that also
 7 undermines the assertion that Operation Safe Schools was a race-blind operation targeting only
 8 those who dealt drugs near schools.

9
 10 (c) Strength of the Evidence

11 The government additionally claims that its charging decisions were based in part on the
 12 “strength of the evidence against each defendant”; however, this was a sting operation organized
 13 by the DEA/SFPD taskforce, in which the same tactics were used for the 2013 operation, and
 14 then one of two tactics used for the 2014 operation. *See supra* at section I(D). The “strength of
 15 the evidence” was therefore entirely based on whom the DEA/SFPD chose to target and how
 16 they chose to conduct the sting operation. The government has never stated that the DEA/SFPD
 17 taskforce targeted any non-Blacks. If it didn’t, the government cannot credibly claim that its law
 18 enforcement officers can collect evidence only against Blacks, and that, as a result, because there
 19 is only “strong evidence” against a Black person, a prosecutor’s subsequent decision to charge
 20 that Black person is race neutral.

21
 22 ii. **Use of a policy susceptible to abuse**

23 If the USAO established policies that permitted racial profiling to occur by law
 24 enforcement (or failed to put into place any policies to prevent racial profiling), that is sufficient
 25 evidence of discriminatory intent whether or not the prosecutors are themselves motivated by
 26 racial animus. *See Wayte*, 470 U.S. at 626 (courts must take into account whether the selection

1 criteria used by the government was subject to abuse or otherwise not neutral). *See also id.* at
 2 629 (“Adherence to a particular policy or practice, with full knowledge of the predictable effects
 3 of such adherence ... is one factor among others which may be considered by a court in
 4 determining whether a decision was based on an impermissible ground.”) (internal citations
 5 omitted). Courts have recognized, for example, that a policy that is susceptible to abuse or
 6 allows for excessive officer discretion can lead a factfinder to conclude that the decision makers
 7 were motivated by race. *Casteneda v. Partida*, 430 U.S. 482, 494 (1977) (a “procedure that is
 8 susceptible to abuse or is not racially neutral supports the presumption of discrimination raised
 9 by the statistical showing”); *Rodriguez v. California Highway Patrol*, No. 99cv20895 JF, (N.D.
 10 Cal. Aug. 1, 2001) [Docket No. 211] (discussing a policy that permits excessive officer
 11 discretion). In fact, in the *Batson* context, the Supreme Court recognized that statistical
 12 disparities may raise a presumption of discrimination when the procedure at issue presents “the
 13 opportunity for discrimination.” *Batson*, 476 U.S. at 95.

14 Here, the line AUSAs who brought the cases in the 2014 declare that for each of the cases
 15 they brought, they were “provided an account of the individual’s conduct memorialized in a
 16 Drug Enforcement Administration Form 6, surveillance video of the drug buys taken by the San
 17 Francisco Police Department, and the criminal history of each defendant.” Hawkins Decl., ¶ 5;
 18 Farnham Decl., ¶ 5.⁶⁰ In other words, it appears from the declarations that the AUSAs became
 19 involved after the DEA/SFPD taskforce had chosen the targets, conducted the operations, and
 20 written the report. The AUSAs did not state that they participated in the decision about who
 21 should be targeted for Operation Safe Schools. Moreover, the declarations do not claim that the
 22 AUSAs ever inquired whether any persons who had not been presented for prosecution met the
 23 charging criteria set forth by the USAO. Nor do the declarations state that the AUSAs turned
 24 down any persons presented for prosecution by the DEA/SFPD taskforce. Rather, the
 25

26⁶⁰ The Government did not provide declarations for the line AUSAs from the 2013 sweep.

1 declarations indicate that once the DEA/SFPD taskforce had completed the operation and a
 2 report was prepared, the AUSA reviewed it to determine whether to prosecute. Such a procedure
 3 is “susceptible to abuse” in that there is no system to insure that the law enforcement actors are
 4 not engaging in racial profiling.

5 The government cannot defend itself by claiming that it was unaware of the similarly-
 6 situated persons identified in this motion. The government has already conceded that the
 7 AUSAs were “familiar[] with the Tenderloin, its residents, and the drug dealing that occurred
 8 there,” at the time they began Operation Safe Schools. *See supra* at I.F. Considering the
 9 overwhelming evidence from multiple sources that the Tenderloin drug-selling population is
 10 racially diverse, that different races control different areas in the Tenderloin, and that Latinos
 11 control the public areas near Hastings Law School, the U.S. post office, and U.N. plaza, it is
 12 inconceivable that a person “familiar with the Tenderloin, its residents, and the drug dealing that
 13 occurred there, could reasonably believe that Blacks are the only race that sells in the Tenderloin.
 14 *See supra*, at sections II, III and IV. As to the government’s claim that the two supervisory
 15 AUSAs were not aware of the race of any defendant before authorizing prosecution, Mtn.
 16 Seeking Ruling at 7:1-6,⁶¹ the rap sheet – and often the police report – state the race of the
 17 defendant. Phillips Related Case Decl., Attachment H; Ex. 41 Amram Disco. Mtn. Decl., Att. A
 18 at Ex.03094-04144. Moreover, Operation Safe Schools consisted of two sweeps – one in 2013
 19 and one in 2014. Once the first fourteen people were arrested and arraigned in the 2013 sweep,
 20 the government must have been aware that they all appeared to be Black. Likewise, once the
 21 defendants for the 2014 sweep were brought into court, the government must also have noticed

22 ⁶¹ AUSA Hasib, who initiated Operation Safe Schools, says he, too, did “not know of the race of
 23 most of the defendants prosecuted in Operation Safe Schools.” *Id.* at 6:18-19. The two line
 24 AUSAs for the 2014 sweep, Sarah Hawkins and Lloyd Farnham, do not claim that they were
 25 unaware of the race of the defendants before prosecuting them. Declaration of Sarah Hawkins In
 26 Support Of United States’ Motion (“Hawkins Decl.”) [Docket No. 51-1]; Declaration of Lloyd
 27 Farnham In Support Of United States’ Motion (“Farnham Decl.”) [Docket No. 51-2].

1 that they appeared to be all Black as well. Finally, the filings in the *Furminger* case show that
 2 the government appears to have received the racist text messages before Fall 2014. *See Phillips*
 3 Related Case Decl., Att. I [Docket No. 247-1 in *United States v. Furminger*, No. 14-102 CRB]
 4 (saying that the government received the messages while investigating the case).

5 Thus, before the 2014 sweep, the government was, or should have been, on notice that: 1)
 6 the drug traffickers in the Tenderloin were racially diverse; 2) all defendants from the 2013
 7 sweep were Black, and 3) that there were issues regarding racism in the SFPD. Considering that
 8 both civil litigants and criminal defendants cannot escape liability by “deliberately shielding
 9 themselves from clear evidence of critical facts that are strongly suggested by the
 10 circumstances,” *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 756 (2011) (applying
 11 the willful blindness doctrine to civil cases), the government cannot avoid responsibility by
 12 claiming that it lacked awareness of facts that should have put it on notice of the need to insure
 13 racial bias was not effecting law enforcement officers’ decisions on whom to present for
 14 prosecution. Yet the government’s declarations do not indicate any such procedures were put in
 15 place – even after the 2013 sweep netted only Black defendants.

16

17 II. Selective Enforcement

18 A. A Selective Enforcement Claim is Cognizable

19

20 In *Whren v. United States*, 517 U.S. 806 (1996), the Supreme Court confirmed that an
 21 officer’s discriminatory motivations for pursuing a course of action can give rise to an Equal
 22 Protection claim, even when there is no Fourth Amendment violation. The “Constitution
 23 prohibits selective enforcement of the law based on considerations such as race. But the
 24 constitutional basis for objecting to intentionally discriminatory application of laws is the Equal
 25 Protection Clause, not the Fourth Amendment.” *Whren*, 517 U.S. at 813. *See also Yick Wo v.*
 26 *Hopkins*, 118 U.S. 356 (1886) (“Though the law itself be fair on its face, and impartial in

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1 appearance, yet, if it is applied and administered by public authority with an evil eye and an
 2 unequal hand, so as practically to make unjust and illegal discriminations between persons in
 3 similar circumstances, material to their rights, the denial of equal justice is still within the
 4 prohibition of the constitution.”).⁶²

5 Since the Supreme Court’s decision in *Whren* and *Armstrong*, the defense has not found a
 6 citable decision in which the Ninth Circuit addressed either, in a criminal case, a selective
 7 prosecution claim based solely on the actions of law enforcement, or a selective enforcement
 8 claim.⁶³ The Ninth Circuit has, however, plainly recognized the viability of an Equal Protection
 9 claim based on selective enforcement in the civil rights (§ 1983) context. *Lacey v. Maricopa*
 10 *County*, 693 F.3d 896, 920 (9th Cir. 2012) (en banc) (citing *Armstrong*, 517 U.S. at 465);
 11 *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1153 (9th Cir. 2007) (citing
 12 *Armstrong*, 517 U.S. at 465). There is no logical reason for why dismissal of a criminal charge
 13 would be the appropriate remedy for an Equal Protection violation caused by the prosecutor, but

14 ⁶² Before the Supreme Court’s rulings in *Armstrong* and *Whren*, the Ninth Circuit held that “the
 15 proper focus in discriminatory prosecution cases is on the ultimate decision-maker.” *United*
 16 *States v. Gomez-Lopez*, 62 F.3d 304, 306 (9th Cir. 1995). Therefore the Ninth Circuit denied
 17 selective prosecution claims when “the ultimate decision to prosecute is several steps removed
 18 from the [] officer,” and [t]here is no evidence that the decision to prosecute [] was made by
 19 anyone other than the USAO” *Id.* (citing *United States v. Erne*, 576 F.2d 212, 216 (9th Cir.
 20 1978; *United States v. Greene*, 698 F.2d 1364 (9th Cir. 1983)). None of these cases addressed a
 21 selective enforcement claim. However, as discussed *supra* at pp. 87-89, if discovery shows that
 22 for Operation Safe Schools, the USAO in effect delegated the decision to prosecute to the law
 23 enforcement agents (by, for example, not declining anyone presented for prosecution nor
 24 inquiring who else met the charging criteria but had not been presented for prosecution) then the
 25 racial bias of the law enforcement officers results in selective prosecution as well as selective
 26 enforcement. See *United States v. Monsoor*, 77 F.3d 1031, 1035 (7th Cir. 1996) (explaining that
 27 in the vindictiveness context, the animus of the investigating agency will be imputed to the
 28 prosecutors if a defendant shows that the agency prevailed upon the prosecutor in making the
 decision to seek an indictment).

29 ⁶³ However, in *Turner*, the Ninth Circuit’s opinion took into account the actions of law
 enforcement: “appellees have offered no evidence whatsoever of an intent on the part of the
 30 prosecutors to prosecute them on account of their race, and the prosecutors **and FBI**
 31 **investigators** have under oath denied such motivation. No reason was given by the district court
 32 to doubt the “background presumption” that United States Attorneys are properly discharging
 33 their duties, no reason given to doubt the integrity of prosecutors **and investigators** whose
 34 honesty, good faith, and absence of racial bias are unimpaired by anything in evidence before the
 35 court.” *Turner*, 104 F.3d at 1185 (emphasis added).

1 unavailable when caused by law enforcement. Under either circumstance, the defendant's
 2 prosecution is the result of an unconstitutional application of the law. *See United States v. Davis*,
 3 793 F.3d 712 (7th Cir. 2015) (en banc) ("If the [law enforcement] agencies do [discriminate],
 4 they have violated the Constitution – and the fact that the United States Attorney may have
 5 prosecuted every case the agencies presented, or chosen 25% of them in a race-blind lottery,
 6 would not matter, since the constitutional problem would have preceded the prosecutor's role
 7 and could not be eliminated by the fact that things didn't get worse at a later step.").

8 Moreover, every other circuit that has addressed a motion to dismiss for selective
 9 enforcement has addressed the merits of the claim – no circuit has held that selective
 10 enforcement cannot result in dismissal.⁶⁴ *Davis*, 793 F.3d 712; *Gibson v. Superintendent*, 411
 11 F.3d 427, 441 (3d Cir. 2005) ("Whren and Carrasca stand for the proposition that, even though
 12 the Fourth Amendment reasonableness standard is not influenced by the subjective intentions of
 13 the person making the search or seizure, if a person can demonstrate that he was subjected to
 14 selective enforcement in violation of his Equal Protection rights, his conviction will be
 15 invalid."); *Alcaraz-Arellano*, 441 F.3d at 1264; *United States v. Barlow*, 310 F.3d 1007, 1012
 16 (7th Cir. 2002); *United States v. Bell*, 86 F.3d 820, 822-23 (8th Cir. 1996); *United States v.*
 17 *James*, 257 F.3d 1173, 1179 (10th Cir. 2011); *See also United States v. Lamar*, 2015 WL
 18 4720282 (S.D.N.Y. Aug. 7, 2015) (motion denied but no argument raised that selective
 19 enforcement is not cognizable); *Duque-Nava*, 315 F.Supp.2d at 1152; *Tuitt*, 68 F.Supp.2d at 15
 20 (noting that if "the investigators and police authorities exercised discriminatory intent in
 21 Defendant's arrest and/or their referral to the United States Attorney's Office, his selective

22 ⁶⁴ In addition, as the Ninth Circuit recognized in *United States v. Montero-Camargo*, 208 F.3d
 23 1122, 1134 (9th Cir. 2000) (en banc), there have been "significant changes in the law restricting
 24 the use of race as a criterion in government decision-making. The use of race and ethnicity for
 25 such purposes has been severely limited." *See also id.* at 1135 ("Stops based on race or ethnic
 26 appearance send the underlying message to all our citizens that those who are not white are
 27 judged by the color of their skin alone. Such stops also send a clear message that those who are
 28 not white enjoy a lesser degree of constitutional protection—that they are in effect assumed to be
 potential criminals first and individuals second.")

prosecution claim may be meritorious even without a showing of the prosecutor's intent when deciding to seek an indictment"); *United States v. Whitfield*, 29 F.Supp.3d 503, 511 (E.D. Pa. 2014); *Marshall*, 345 F.3d at 1167 ("Racially selective law enforcement violates this nation's constitutional values at the most fundamental level; indeed, unequal application of criminal law to white and black persons was one of the central evils addressed by framers of the Fourteenth Amendment."). Cf. *United States v. Hare*, 308 F.Supp.2d 955, 96 n.2 (D. Neb. 2004) (noting that there is no Supreme Court or Eighth Circuit authority for dismissal or suppression for selective enforcement).

It bears noting that a large selective enforcement challenge is currently pending in the Northern District of Illinois regarding the phony-stash-house cases brought by the ATF. The cases have not been consolidated and a number of district judges have issued discovery orders for selective enforcement. One discovery order was appealed to a three-judge panel of the Seventh Circuit and then appealed again to an *en banc* panel. In all courts in which the selective enforcement challenge is pending – the district courts and the Seventh Circuit – the government has not even raised the argument that dismissal is not an appropriate remedy for selective enforcement. *United States v. Paxton*, 2014 WL 1648746 (N.D. Ill., Apr. 17, 2014); *United States v. Brown et al.*, 12-CR-632 (N.D. Ill., Nov. 8, 2013) [Docket No. 171]; *United States v. Alexander*, 2013 WL 6491476 (N.D. Ill. Dec. 10, 2013). In fact, the government's repeated motions for a continuance of the briefing in the *en banc* appeal show that the U.S. Attorney's Office for the Northern District of Illinois consulted with the Solicitor General's Office on the briefing for the selective enforcement challenge, and still no argument was raised that selective enforcement is not a cognizable claim in a criminal case. Government's Motion For Extension of Time Within Which To File A Petition For Rehearing *En Banc*, No. 14-1124, *United States v. Davis*, (7th Cir. Filed 9.15.04) [Docket Nos. 43, 45 and 47].

Nevertheless, the USAO in this District has taken the position that, even where a criminal defendant proves an equal protection violation based on selective enforcement, dismissal of the

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1 indictment is not an appropriate remedy for that constitutional violation. *See* Gov't Mtn. Seeking
 2 Ruling at 2-6. Rather, the government claims that the *exclusive* remedy for such a violation is a
 3 civil rights action under 42 U.S.C. § 1983. *Id.* at 2. In so doing, the government cites to a Sixth
 4 Circuit opinion, *United States v. Nichols*, 512 F.3d 789 (6th Cir. 2008) *overruled on other*
 5 *grounds as recognized in United States v. Buford*, 632 F.3d 264, 269 (6th Cir. 2011).⁶⁵ The
 6 government's heavy reliance on *Nichols* is misplaced. Most importantly, the defendant in
 7 *Nichols* sought the suppression of evidence based on a racially motivated traffic stop – **not** the
 8 dismissal of an indictment. *See id.* at 792-95. Thus, the court in *Nichols* addressed only whether
 9 the exclusionary rule was “the proper remedy” for an equal protection violation, *id.* at 794, not
 10 whether dismissal of the indictment would be an appropriate remedy when a prosecution is
 11 predicated on an equal protection violation. *Nichols*, therefore, is of no moment here. The
 12 government's citation to *Hudson v. Michigan*, 547 U.S. 591 (2006), is similarly unavailing, as
 13 the Court there was considering the applicability of the exclusionary rule to a Fourth Amendment
 14 knock-and-announce violation – not the “intentionally discriminatory application” of the law as
 15 discussed in *Whren*, 517 U.S. at 813.

16 B. Standard for Selective Enforcement⁶⁶

17 Most courts that have addressed selective enforcement have applied the *Armstrong*
 18 standard.⁶⁷ *See Alcaraz-Arellano*, 441 F.3d at 1256; *Farm Labor Org. Comm.*, 308 F.3d at 534,
 19

20 ⁶⁵ The government also cites two district court orders, but those cases simply cite *Nichols* with
 21 minimal, if any, analysis. *See United States v. Harmon*, 785 F.Supp.2d 1146, 1170 (D.N.M.
 22 2011); *United States v. Foster*, 2008 WL1927392, at *5 (M.D. Ala. 2008).

23 ⁶⁶ As the Seventh Circuit explained: “Law enforcement has a racially discriminatory effect when
 24 members of a protected racial group – in this case African Americans – receive less favorable
 25 treatment than nonmembers.” *Barlow*, 310 F.3d at 1010 (holding that to obtain discovery on a
 26 selective enforcement claim, defendant had to show that the DEA agents chose not to approach
 27 whites to whom he was similarly situated).

28 ⁶⁷ Though the Ninth Circuit has not addressed a selective enforcement claim in a criminal case, it
 29 has held in the civil rights context that “[e]nforcement may be shown through a variety of actual
 30 or threatened arrests, searches and temporary seizures, citations, and other coercive conduct by
 31 the police.” *Lacey*, 693 F.3d at 920.

1 538, 542; *Marshall*, 345 F.3d at 1167; *Barlow*, 310 F.3d at 1012; *Bell*, 86 F.3d at 822-23; *United*
 2 *States v. Dixon*, 486 F.Supp.2d 40, 44 (D.D.C. 2007). *See also James*, 257 F.3d at 1179 (“While
 3 the legal standards for examination of the issue of selective prosecution and enforcement are the
 4 same, the factual analysis is distinct. To prove discriminatory effect in a race or ethnicity-based
 5 selective prosecution claim, a defendant must make a credible showing that a similarly-situated
 6 individual of another race could have been prosecuted for the offense for which the defendant
 7 was charged. If such a claim is based on the investigative phase of the prosecution, however, the
 8 defendant must instead make a credible showing that a similarly-situated individual of another
 9 race could have been, but was not, arrested or referred for federal prosecution for the offense for
 10 which the defendant was arrested and referred.”).

11 However, in *Davis*, an *en banc* panel of the Seventh Circuit decided that the *Armstrong*
 12 presumption of regularity does not apply to selective enforcement:

13 To the extent that Davis and the other six defendants want information about how
 14 the United States Attorney has exercised prosecutorial discretion, *Armstrong* is an
 15 insuperable obstacle (at least on this record). But the defendants’ principal targets
 16 are the ATF and the FBI. They maintain that these agencies offer lucrative-
 17 seeming opportunities to black and Hispanic suspects, yet not to those similarly
 18 situated in criminal background and interests but of other ethnicity. If the agencies
 19 do that, they have violated the Constitution—and the fact that the United States
 20 Attorney may have prosecuted every case the agencies presented, or chosen 25%
 21 of them in a race-blind lottery, would not matter, since the constitutional problem
 22 would have preceded the prosecutor’s role and could not be eliminated by the fact
 23 that things didn’t get worse at a later step. *Cf. Connecticut v. Teal*, 457 U.S. 440,
 24 (1982) (rejecting a “bottom-line defense” in an employment-discrimination suit).

25 Agents of the ATF and FBI are not protected by a powerful privilege or covered
 26 by a presumption of constitutional behavior. Unlike prosecutors, agents regularly
 27 testify in criminal cases, and their credibility may be relentlessly attacked by
 28 defense counsel. They also may have to testify in pretrial proceedings, such as
 hearings on motions to suppress evidence, and again their honesty is open to
 challenge. Statements that agents make in affidavits for search or arrest warrants
 may be contested, and the court may need their testimony to decide whether if
 shorn of untruthful statements the affidavits would have established probable
 cause. *See Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667
 (1978). Agents may be personally liable for withholding evidence from
 prosecutors and thus causing violations of the constitutional requirement that

1 defendants have access to material, exculpatory evidence. *See, e.g., Armstrong v.*
 2 *Daily*, 786 F.3d 529 (7th Cir.2015); *Newsome v. McCabe*, 256 F.3d 747, 752 (7th
 3 Cir.2001). Before holding hearings (or civil trials) district judges regularly, and
 4 properly, allow discovery into nonprivileged aspects of what agents have said or
 5 done. In sum, the sort of considerations that led to the outcome in *Armstrong* do
 6 not apply to a contention that agents of the FBI or ATF engaged in racial
 7 discrimination when selecting targets for sting operations, or when deciding
 8 which suspects to refer for prosecution.
 9

10 6 *Davis*, 793 F.3d at 721.

11 7 Two other courts have similarly held that *Armstrong* does not apply to selective
 12 enforcement: *Rodriguez v. California Highway Patrol*, 89 F.Supp.2d 1131, 1141 (N.D. Cal.
 13 2000) (the “presumption of regularity” that supports prosecutorial decisions and results in
 14 “special deference to the prosecutorial office,” does not apply to selective enforcement); *Duque-*
 15 *Nava*, 315 F.Supp.2d at 1152 (“This case presents no issue of federalism. Nor is the deference
 16 accorded to the executive branch’s power to prosecute accorded to law enforcement to the same
 17 degree. In the civil context, prosecutors are bestowed with absolute immunity for decisions and
 18 actions that are within a prosecutor’s scope of responsibility; law enforcement officers are
 19 bestowed with only qualified immunity.”).

20

21 C. The Defense Has Established a Prima Facie Case of Selective Enforcement

22

23 1. **The Defense Has Made a Prima Facie Showing of Discriminatory
 24 Effect With Respect to Selective Enforcement**

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29 In section I.A.2.(b) above, the defense compellingly demonstrated a prima facie case of
 30 discriminatory effect with respect to selective prosecution. For the same reasons articulated
 31 there, the defense likewise has shown discriminatory effect with respect to selective
 32 enforcement.

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1 **2. The Defense Has Made a Prima Facie Case of Discriminatory Intent
2 in Regards to Selective Enforcement**

3 The defense has provided over 30 declarations from community members and Operation
4 Safe School defendants showing explicit racial animus by law enforcement officers involved in
5 Operation Safe Schools against the Operation Safe Schools defendants - including the use of
6 racial slurs (“nigger,” “boy,” “little black bitch”), violence, sexual misconduct and inappropriate
7 searches of Black females by male officers. The defense has also identified the use of racially
8 derogatory language deployed during an Operation Safe Schools undercover operation (“Fucking
9 BM”), and evidence of systemic racial bias, and racial animus, within the SFPD generally.

10 The defense has provided Declarations from community members, including a law
11 professor and a security guard, attesting to the racial diversity of drug sellers in the Tenderloin
12 and law enforcement’s awareness of it. In addition, the police reports the defense obtained
13 through the public records requests show law enforcement knowledge of hundreds of non-Black
14 drug sellers operating in the Tenderloin. Finally, the defense has provided police reports
15 obtained through public records requests in which SFPD officers says such things as: “I have
16 personally witnessed numerous Hispanic individuals that stand on that street corner for hours at a
17 time ... I have directed Tenderloin officers to focus their attention on the drug dealers on that
18 corner and the officers have made numerous drug arrests there.” Ex. 1, Koeninger Disco. Mtn.
19 Decl., Att. A at Ex.00539.

20 Though “[p]roving the motivation behind official action is often a problematic
21 undertaking,”⁶⁸ *Hunter*, 471 U.S. at 228, here, the evidence, both direct and circumstantial, of
22 discriminatory intent is overwhelming. *See Village of Arlington Heights*, 429 U.S. at 266, 97 S.
23 Ct. 555, 564, 50 L. Ed. 2d 450 (“Determining whether invidious discriminatory purpose was a
24 motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of

25 ⁶⁸In fact, the use of racially derogatory language is sufficient - “[s]uch language is strong
26 evidence of racial animus, an essential element of any equal protection claim.” *Chavez*, 251 F.3d
27 at 646. But the defense has provided far more than racial slurs.

1 intent as may be available.”)⁶⁹

2 CONCLUSION

3 The Supreme Court’s rejection of the evidence proffered in *Armstrong* convinced some
 4 commentators that the decision renders many meritorious claims of selective prosecution
 5 impossible to prove. *See, e.g.*, Richard H. McAdams, *Race and Selective Prosecution:*
 6 *Discovering the Pitfalls of Armstrong*, 73 Chi. Kent L.Rev. 605, 606 (1998); Melissa L. Jampol,
 7 *Goodbye to the Defense of Selective Prosecution*, 87 J.Crim.L. & Crimonology 932 (1997);
 8 Note, *Race-Based Selective Prosecution*, 110 Harv.L.Rev. 165 (1996). *See also* Randall
 9 Kennedy, RACE CRIME AND THE LAW 357–59 (1997). In this case, the defense has done
 10 everything required by every standard established by every Court that has ever addressed either
 11 selective prosecution or selective enforcement since *Armstrong*. The defense has identified not
 12 just one, but hundreds of similarly-situated persons – and described 42 in detail. The defense has
 13 provided evidence of a statistical disparity – between state and federal prosecutions, and between
 14 the offender population and the federal targets – that is so vast that “there is virtually no chance
 15 that this difference is the result of chance.”⁷⁰ The defense provided dozens of declarations
 16 attesting to explicit racial animus by the law enforcement officers involved.
 17

18 ⁶⁹ Moreover, district courts have granted similar discovery requests on lesser showings than the
 19 defendants have made here. For example, the Chief Judge in the Northern District of Illinois
 20 ordered the Government to provide discovery where “[t]he defendants’ motion has specifically
 21 identified 17 phony stash house rip off cases [whose] data shows that the overwhelming targets
 22 of these investigations were African Americans [and] none of the defendants … were
 23 nonminorities.” Order Compelling Discovery, *United States v. Antonio Williams et al.*, 12 Cr.
 24 887 (N.D. Ill. July 31, 2013), ECF No. 70; *see also Paxton*, 2014 WL 1648746, at *5 (ordering
 25 discovery where “[a]ll of the cases identified by defendants have involved undercover operations
 26 by ATF agents in circumstances largely similar to the instant case [and where] the statistics
 27 appear to be reliable because they are corroborated, in part, by the lists of cases provided by the
 28 government, and there is no assertion that the information collected by defendants as to race is
 inaccurate”).

26 ⁷⁰ Ex. 41, Amram Disco. Mtn. Decl., Att. M.

1 This evidence, and the prosecutors own declarations, raise serious questions regarding
 2 whether the prosecutors failed in their obligation to put in place policies to insure that racial bias
 3 did not impact law enforcement's decisions on whom to present for prosecution despite knowing
 4 (or being in possession of facts that would obligate one to know) about the problems with racism
 5 in SFPD. As a result, this Court is faced with the strongest *prima facie* case of selective
 6 prosecution and selective enforcement since the Supreme Court decided *Armstrong*. And this
 7 Court must decide whether the commentators are correct that *Armstrong* makes selective
 8 prosecution impossible to prove or whether, if, as has been done here, a defendant does
 9 everything required by *Armstrong*, she will get discovery and have her claim heard on the merits.

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DISCOVERY REQUEST

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The defense requests the following discovery:

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1. A list of all cases prosecuted pursuant to Operation Safe Schools (*see Phillips Related Case Decl.*, Att. C [12.09.13 USAO Press Release]; Att. D [2.12.15 USAO Press Release]), and the race of each defendant charged in those cases.
2. A list of all persons who were considered for prosecution pursuant to Operation Safe Schools, but for whom prosecution was declined, and the race of those persons.
3. All writings, records, and/or memorializations setting out the real-time reasons the DEA and/or the SFPD gave for pursuing—or not pursuing—an individual defendant or case in Operation safe Schools.
4. The charging selection criteria for Operation Safe Schools.
5. Issuance of a Rule 17 subpoena to the DEA and the SFPD for the personnel files for all DEA agents and SFPD officers involved in Operation Safe Schools. Or, in the

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1 alternative, the defense will agree that the USAO review the personnel files of all the law
 2 enforcement officers involved and disclose any documents discoverable under *Pitchess v.*
 3 *Superior Court*, 11 Cal.3d 531 (1974) and *United States v. Henthorn*, 931 F.2d 29 (9th
 4 Cir. 1991), including: all records of any and all complaints; any known history of
 5 misconduct as a law enforcement officer; past instances where an officer's veracity or
 6 candor has been called into question; formal or informal reprimands from the DEA or
 7 SFPD or other known law enforcement agencies; pending or resolved internal
 8 investigations and/or substantiated reports of corruption and/or other improper conduct;
 9 and any allegations of racial bias (generally) or sexually inappropriate behavior (directed
 10 toward Black civilians).

- 12 6. Issuance of a Rule 17 subpoena to SFPD for: (a) all Field Interview Cards and incident
 13 reports relating to the investigation, arrest or prosecution of narcotics offenses by
 14 Tenderloin police station (Company J), Southern Police Station (Company B), Northern
 15 Police Station (Company E) and Narcotics Division from January 1, 2013 to August 4,
 16 2015; and (b) rap sheets for any person identified in such Field Interview Cards or
 17 incident reports who was investigated, arrested, or prosecuted for a narcotics offense.
- 18 7. Rap sheets and SFPD incident reports for all individuals identified in Attachment B to
 19 Exhibit 6, Declaration of August Sommerfeld. Rap sheets for all persons identified in
 20 Attachment B to Exhibit 1, Declaration of Steven J. Koeninger.
- 21 8. Issuance of a Rule 17 subpoena for all incident reports from the 2009 through 2013
 22 Operation Safe Schools initiatives, based in the Tenderloin, by SFPD and the San
 23 Francisco District Attorney's Office, as referenced in Attachments G through J to the
 24 Amram Discovery Motion Decl. at Ex.04167-76. Rap sheets for any person considered
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1 for prosecution pursuant to the Operation Safe Schools initiatives described in this
2 paragraph.

3 9. All documents and communications, including all emails, memos, text messages, press
4 releases, voicemail messages, audio and video recordings, between: (a) any persons
5 employed by the USAO; (b) any persons employed by the DEA; (c) any persons
6 employed by the SFPD; (d) the USAO (and any person employed by the USAO) and the
7 DEA (and any person employed by the DEA); (e) the USAO (and any person employed
8 by the USAO), and the SFPD (and any person employed by the SFPD); and (f) the DEA
9 (and any person employed by the DEA) and the SFPD (and any person employed by the
10 SFPD), related to: the investigation of any individuals pursuant to Operation Safe
11 Schools; the decision to investigate (or not investigate) anyone pursuant to Operation
12 Safe Schools; the charging criteria for Operation Safe Schools; the decision to charge (or
13 not charge) anyone in Operation Safe Schools; the race of any Operation Safe Schools
14 defendant; and the decision to decline charging someone in Operation Safe Schools.
15 Such documents and communications includes those made on personally owned devices
16 and/or personally maintained email accounts or social media accounts.

17 10. For each Operation Safe Schools case, a statement of the prior criminal investigations, if
18 any, that the DEA and/or SFPD conducted into each defendant before initiating the
19 Operation Safe Schools prosecution.

20 11. All SFPD Manuals, circulars, field notes, correspondence, or any other material which
21 discusses Operation Safe Schools including protocols and/or directions to officers and
22 confidential informants regarding how to conduct such operations, how to determine
23 which persons to pursue as potential targets or ultimate defendants, and how to ensure
24

1 that officers are not targeting persons for such operations on the basis of their race, color,
2 ancestry, or national origin.

3 12. All national and California Divisions of the DEA Manuals, circulars, field notes,
4 correspondence, or any other material which discusses Operation Safe Schools including
5 protocols and/or directions to agents and confidential informants regarding how to
6 conduct such operations, how to determine which persons to pursue as potential targets or
7 ultimate defendants, and how to ensure that agents are not targeting persons for such
8 operations on the basis of their race, color, ancestry, or national origin.
9

10 13. All documents containing information on how supervisors and managers of the DEA
11 were to ensure and/or did ensure that their agents were not targeting persons on the basis
12 of their race, color, ancestry, or national origin for these Operation Safe Schools cases,
13 and what actions those supervisors and managers took to determine whether agents were
14 in fact targeting persons for those reasons.
15

16 14. All documents containing information on how supervisors and managers of the SFPD
17 were to ensure and/or did ensure that their officers were not targeting persons on the basis
18 of their race, color, ancestry, or national origin for these Operation Safe Schools cases,
19 and what actions those supervisors and managers took to determine whether officers were
20 in fact targeting persons for those reasons.
21

22 15. The number of confidential informants that the DEA has used in Operation Safe Schools
23 cases and the number of those confidential informants that had access to non-Black
24 persons who could be targeted for a phony-stash case.
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26 16. What, if anything, any confidential informant was told about the criteria being used to
27 target individuals for Operation Safe Schools.
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- 1 17. The number of confidential informants that the SFPD has used in Operation Safe Schools
2 cases and the number of those confidential informants that had access to non-Black
3 persons who could be targeted for a phony-stash case.
- 4 18. Discovery from, and other information pertaining, to Operation Safe Schools cases where
5 the USAO, and/or the DEA, and/or the SFPD targeted non-African American persons.
- 6 19. All documents that contain information about actions taken by the USAO to ensure that
7 defendants in Operation Safe Schools cases brought by the USAO had not been targeted
8 due to their race, color, ancestry, or national origin.
- 9 20. A Rule 17 subpoena to ABC 7 News for any and all footage (including outtakes and
10 unpublished footage) pertaining to Operation Safe Schools, as well as all documents and
11 communications between ABC 7 News and the USAO, the DEA, and/or SFPD regarding
12 Operation Safe Schools. *See* Ex. 41, Amram Disco. Mtn. Decl., Att. Ex.04228.
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28 NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
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1

2 Dated: December 02, 2015

3

4 By: */s/ Galia Amram*
5 GALIA AMRAM
6 Attorney for Defendants Carey, Reed,
7 Reddic and Rouse

8

9 Dated: December 02, 2015

10

11 By: */s/ Ellen Leonida*
12 ELLEN LEONIDA
13 Attorney for Defendants Mumphrey and
14 Matthews

15

16 Dated: December 02, 2015

17

18 By: */s/ Candis Mitchell*
19 CANDIS MITCHELL
20 Attorney for Defendant Adams

21

22 Dated: December 02, 2015

23

24 By: */s/ Daniel P. Blank*
25 DANIEL P. BLANK
26 Attorney for Defendants Anthony, Dixon
27 and McNeal

28

Dated: December 02, 2015

By: */s/ Randy Sue Pollock*
RANDY SUE POLLOCK
Attorney for Defendant Madlock